INDIAN LAW REPORTS,

CALCUTTA SERIES,

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT CALCUTTA AND BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON APPEAL FROM THAT COURT AND FROM ALL OTHER COURTS IN BRITISH INDIA [EXCEPT THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH] NOT SUBJECT TO ANY HIGH COURT.

Editor ... ... B. D. BOSE, *Barrister-at-Law.*

REPORTERS :

PRIVY COUNCIL ... ... J. V. WOODMAN, *Barrister-at-Law.*

HIGH COURT, CALCUTTA ...
J. CAMELL, *Barrister-at-Law.*
E. H. MONNIER, *Barrister-at-Law.*
S. MITRA, *Vakil, High Court.*
S. KHUDA BUKHSH, *Barrister-at-Law.*
G. SIRCAR, *Vakil, High Court.*
O. MOSES, *Barrister-at-Law.*
A. S. M. L. RAHMAN, *Barrister-at-Law (offg).*
N. GOSWAMI, *Barrister-at-Law (offg).*

VOL. XLV.

JANUARY TO DECEMBER 1918.

Published under the Authority of the Governor-General in Council,

BY THE BENGAL SECRETARIAT FINANCIAL DEPARTMENT,
BOOK DEPÔT BRANCH,
WRITERS' BUILDINGS, CALCUTTA.

HIGH COURT,

1918.

—:o:—

Chief Justice:

THE HON'BLE SIR LANCELOT SANDERSON, KT., K.C.

Puisne Judges:

THE HON'BLE SIR JOHN G. WOODROFFE, KT.
" " SIR ASUTOSH MOOKERJEE, KT., C.S.I.
" " SIR CHARLES W. CHITTY, KT.
" " E. E. FLETCHER.
" " N. R. CHATTERJEA.
" " W. TEUNON.
" " T. W. RICHARDSON.
" " SIR ASUTOSH CHAUDHURI, KT.
" " C. P. BEACHCROFT.
" " H. WALMSLEY.
" " W. E. GREAVES.
" " B. B. NEWBOULD.
" " NAWAB SIR SYED SHAMS-UL-HUDA, K.C.I.E
" " G. C. RANKIN (*Additional*).
" " M. SMITHER (*offg.*).
" " A. H. CUMING (*offg.*).
" " E. B. H. PANTON (*offg.*).

Advocate-General:

THE HON'BLE T. C. P. GIBBONS, K.C.

Standing Counsel:

S. R. DAS.

CORRIGENDA.

Page 131, line 4 from bottom (ref.) *for* "3 Moo. P. C." *read* "3 Moo. I. A."

Page 432, *after* line 3, *insert* "*Mr. J. Camell* for the Crown."

TABLE OF CASES REPORTED.

VOL. XLV.

PRIVY COUNCIL.

	PAGE.		PAGE.
Abdul Hussein Khan *v.* Sona Dero ...	450	Imambandi *v.* Mutsaddi	878
Abdullah Ashgar Khan *v.* Ganesh Das	442	Maung Kyin *v.* Ma Shwe La ...	220
Amrit Narain Singh *v.* Gaya Singh ...	590	Maung Thwe *v.* Maung Tun Pe ...	1
Brij Indar Singh *v.* Kanshi Ram ...	94	Metharam Ramrakhiomal *v.* Rewa Chand Ramrakhiomal ...	666
Dakas Khan *v.* Ghulam Kasim Khan ...	793	Radhakant Lal *v.* Nazma Begum ...	733
Debendra Nath Das *v.* Bibudhendra Mansingh Bhramarbar Roy ...	805	Raj Kumar Thakur Giridhari Singh *v* Megh Lal Pandey	87
Ganga Pershad Singh *v.* Ishri Pershad Singh	748	Raja of Deo *v.* Abdullah ...	909
Gungeshwar Kunwar *v.* Durga Prashad Singh	17	Saudagar Singh *v.* Pardip Narayan Singh	510

FULL BENCH.

Mani Lal Singh *v.* Trustees for the Improvement of Calcutta 343

SPECIAL BENCH.

Moti Lal Ghose and Others, *In re* 169

APPELLATE CIVIL.

	PAGE.
Abdul Rahman *v.* Amin Sharif ...	780
Ambalika Dasi *v.* Aparna Dasi ...	835
Bandiram Mookerjee *v.* Purna Chandra Roy	926
Behari Lal Ghose *v.* Sindhubala Dasi ...	434
Bhushan Chandra Ghose *v.* Srikanta Banerjee	756
Brojendra Lal Das *v.* Deb Narain Tewari	765
Fanindra Narain Roy *v.* Kachemun Bibi	774
Gobinda Chandra Pal *v.* Kailash Chandra Pal	530
Harihar Persad Bajpai *v.* Ajub Misir ...	930
Jadu Nath Manna *v.* Pran Krishna Das	769
Lakshmi Narayan Roy *v.* Secretary of State for India	866
Madhusudan Mahton *v.* Midnapore Zemindari Co	940
Manmatha Nath Dey *v.* Gadadhar Mana	638
Mehdi Hossein *v.* Umesh Chandra Mookerjee	685
Nagendra Lal Chowdhury *v.* Fani Bhusan Das	785
Nanda Lal Banerjee *v.* Umesh Chandra Das	151
Nemai Charan De *v.* Secretary of State for India	496
Nowrang Singh *v.* Janardan Kishor Lal Singh	469
Pran Krishna Bhandari *v.* Surath Chandra Roy	873
Rajani Kanta Mookerjee *v.* Secretary of State for India	645
Saraju Bala Dasi *v.* Jogemaya Dasi ...	634
Secretary of State for India *v.* Gangadhar Nanda	934
Serafat Ali *v.* Issan Ali	691
Shib Chandra Banerjee *v.* Surendra Chandra Mandal	515
Shibnarain Mookerjee *v.* Bhutnath Guchait	475
Sudhir Chandra Das *v.* Gobinda Chandra Roy	538

CIVIL RULES.

Balakeshwari Debi *v.* Jnanananda Banerjee	697
Bireswar Mukerjee *v.* Ambika Charan Bhattacharjea	630
Kanai Lal Ghose *v.* Jatindra Nath Chandra	519
Nanda Lal Ganguli *v.* Khetra Mohan Ghose	585

LETTERS PATENT APPEALS.

Ambar Ali *v.* Lutfe Ali	159
Bejoy Singha Dudhuria *v.* Krishna Behari Biswas	259
Bipradas Pal Chowdhury *v.* Manorama Debi	574
Kailash Chandra Dutta *v.* Padmakisore Roy	285
Surendra Nath Ghose *v.* Kali Gopal Muzumdar	920
Syedunessa Khatun *v.* Amiruddi ...	294

APPELLATE CRIMINAL.

Akhoy Kumar Mookerjee *v.* Emperor ...	720
Amiruddin Ahmed *v.* Emperor ...	557
Elahi Baksh Kazi *v.* Emperor ...	825
Legal Remembrancer *v.* Mozam Mollah	905
Taher Khan *v.* Emperor	641

CRIMINAL REVISION.

	PAGE.		PAGE.
Aslam Meah *v.* Emperor... ...	816	Debendra Nath Das Gupta *v.* Registrar of Joint Stock Companies ...	490
Baidya Nath Bose *v.* Emperor ...	430	Ganesh Chandra Sikdar *v.* Emperor ...	82
Chandi Charan Giri *v.* Gadadhar Pradhan...	336	Lalit Mohan Chakravarti *v.* Hemendra Kumar De	301
Debendra Nath Das Gupta *v.* Registrar of Joint Stock Companies ...	486	Manhari Chowdhuri *v.* Emperor ...	727

MATRIMONIAL JURISDICTION.

Cox *v.* Cox 525

TABLE OF CASES CITED.

A

PAGE

A. G. *v.* Kissance, 32 L. R. Ir. 220 242
Abdool and Mahtab *In re*, 8 W. R. Cr. 32 184
Abdul Hossein *v.* Kasi Saha, I. L. R. 27 Calc. 362 929
Abdul Khader *v.* Chidambaran Chattiyar, I. L. R. 32 Mad. 276 ... 883
Abdullah *v.* Kunj Behary Lal, 14 C. L. J. 467 166
Abdullah Khan *v.* Emperor, I. L. R. 37 Calc. 52, referred to 336, 341
Abhayeswari Debi *v.* Kishori Mohan Banerjee, I. L. R. 42 Calc. 19 ; 18 C. W. N. 1020, discussed 698
Abu Backer Sahib *v.* The Secretary of State for India in Council, I. L. R. 34 Mad. 505 938
Achutaramaraju *v.* Subbaraju, I. L. R. 25 Mad 7 321
Acme Wood Flooring Co., Ld. *v* Sutherland Innes Co., Ld., 9 Com. Cas. 170 35
Adusumalli *v.* Valurapalli, 25 Mad. L. J. 16 697
Adyan Singh *v.* Queen-Empress, I. L. R. 13 Calc. 121 ... 829
Ahid Khondkar *v.* Mohendra Lal De, I. L. R. 42 Calc. 830 ; 19 C. W. N. 804 78
Ajudhia Prasad *v.* Ram Lal, I. L. R. 34 All. 197, referred to 337, 342
Akhil *v.* Monmotha, 18 C. L. J. 616 925
Aklemannessa Bibee *v.* Mahomed Hatem, I. L. R. 31 Calc. 849 ... 882
Alhusen *v.* Prest, 6 Exch. Rep. 7, referred to 775
Amaba Shankar *v.* Ganga Singh, 9 Oudh Cases 97 884
Ambica Prosad *v.* Gopal Buksh Das, 1 C. L. J. 550 498
American Exchange in Europe Case, 58 L. J. Ch. 706, referred to 170
Amrita Lal Hazra *v.* Emperor, I. L. R. 42 Calc. 957, approved ... 720
Amulya Ratan Sircar *v.* Tarini Nath Dey, I. L. R. 42 Calc. 254, distinguished 434
Anandamoyee *v.* Lakhi Chandra Mitra, I. L. R. 33 Calc. 339 ; 3 C. L. J. 274, followed 469
Anant Singh *v.* Durga Singh, I. L. R. 32 All 363 ; L. R. 37 I. A. 191 289
Andrews *v.* The Patriotic Assurance Company of Ireland, L. R. 18 Ir. 115 140
Anund Chunder Roy *v.* Sidhy Gopal Misser, 8 W. R. 112, referred to 520
Aparna Charan Ghose *v.* Kasam Ali, 10 C. W. N. 527 ... 262
Arbitration Act, *In re*, I. L. R. 34 Bom. 1 507
Arnhold Karberg & Co. *v.* Blythe Green, Jourdain & Co., Theodor Schneider & Co. *v.* Burgett & Newsam, [1915] 2 K. B. 379 ; [1916], 1 K. B. 495 34
Arsadulla *v.* Mansubali, 16 C. L. J. 539 758
Ashrufood Dowlah Ahmed Hossein *v.* Hyder Hossein Khan, 11 Moo. I. A. 94 882

PAGE.

Assanulla Khan Bahadur *v.* Tirthabashini, I. L. R. 22 Calc. 680 ... 262
Atrabannessa Bibi *v.* Safatullah Mia, 22 C. L. J. 259, followed ... 920
Attorney-General *v.* Metropolitan Railway Co., [1894] 1 Q. B. 384 357
Avery *v.* Bowden, 5 E. & B. 714 ; 6 E. & B. 953 56
Ayderman Kutti *v.* Syed Ali, I. L. R. 37 Mad. 514, referred to and commented on 879

B

Baba *v.* Shivappa, I. L. R. 20 Bom. 199 883
Badri Das *v.* Inayat Khan, I. L. R. 22 All. 404 distinguished ... 703
Bai Mancha *v.* Narotamdas Kashidas, 6 Bom. H. C. A. C. 1 ... 669
Bai Shirinbai *v.* Kharshedji, I. L. R 22 Bom. 430 290
Baijnath *v.* Ahmed Musaji Saleji, I. L. R. 40 Calc. 219 ... 506
Baijnath Sahai *v.* Ramgut Singh, I. L. R. 23 Calc. 775 ... 498
Bailey *v.* Craft, 4 Taunt. 611, referred to 775
Baksu Lakshman *v.* Govinda Kanji, I. L. R. 4 Bom. 594 ... 321
Balaram *v.* Mangta Das, I. L. R. 34 Calc. 941 373
Balkishen Das *v.* Legge, I. L. R. 22 All. 149 ; L. R. 27 I A. 58 321
Balwant Singh *v.* Gumani Ram, I. L. R. 5 All. 591 98
Bandon *v.* Bechar, 8 Cl. & Fin. 479, followed 920
Banko Behary Das *v.* Krishna Chandra Bhowmick, 18 C. W. N. 340 ; 18 C. L. J. 170 approved 151
Bankruptcy Notice, *In re*, [1907] 1 K. B. 478 506
Banks and Fenwick, *In re*, 26 C. L. J 401, referred to ... 170
Banu Singh *v.* Emperor, I. L. R. 33 Calc. 1353, approved ... 720
Barnardo *v.* Ford, [1892] A. C 326 242
Basant Bibi, *In re*, I. L. R. 12 All. 69, discussed 698
Baylis *v.* Le Gros, 4 C. B N. S. 537 474
Bazlul Karim *v.* Satis Chandra Giri, 13 C. L. J. 418 ; 15 C W. N. 752 288
Bechi *v.* Ashanullah Khan, I. L. R. 12 All. 461 99
Behary Lall Mohurwar *v.* Madho Lall Shirgyawal, 13 B. L. R. 222 ; 21 W. R. 430 512
Bellhouse *v.* Mellor, 4 H. & N. 116, considered 481
Bepin Behary Mitter *v.* Prakash Chandra Sarkar, 13 C. L. J. 148 281
Bessette *v* Conkey & Co., 194 U. S. 324 242
Bhajan Lall *v.* Cheda Lal, 12 All. L. J. 825, followed ... 631
Bhau Nanaji Utpat *v.* Govind, 11 Bom. H. C Rep 249 ... 840
Bhimrao Ramrao Desai *v.* Ayyappa Yellappa I. L. R. 31 Bom. 33 99
Bhobo Soondree Dasseah *v.* Issur Chunder Dutt, 11 B. L R. 36 ... 925
Bhola Pershad *v.* Ram Lall, I. L. R. 24 Calc. 34 925
Bhutnath Dey *v.* Ahmed Hossain, I. L. R. 11 Calc. 417 ... 883
Bhyro Dutt v. Lekhranee Kooer, 16 W. R. 123 318
Bibi Taibatannessa Chowdhurani *v.* Pravabati Dasi, 10 C. L. J. 640 153
Biddell Brothers *v.* E. Clemens Horst Company, [1911] 1 K. B. 214 on appeal. [1911] 1 K. B. 934 ... ... 34, 52
Bikani *v* Shuk Lal, I. L. R. 20 Calc., 116 360
Bindubashini Dasi *v.* Harendra Lal Roy, I. L. R. 25 Calc. 305, discussed 991
Bisu Haldar *v.* Emperor, 11 C. W. N. 836, distinguished ... 905
Blackeney *v.* Fergusson, 14 Ark. 641 164

PAGE.

Blenkinsopp *v.* Blenkinsopp, 11 Beav. 134 ; 2 Phillip 607, referred to 159
Bloomington Church *v.* Muscatine, 2 Iowa 69 255
Boedes Lust, 5 Rob. Admir. 233 35
Bogra *v* Emperor, I. L. R. 34 Mad. 141, approved 825
Boologam *v.* Swornam, I. L. R. 4 Mad. 330 669
Brij Coomaree *v.* Ramrick Dass, 5 C. W. N. 781 115
Brij Mohan Das *v.* Mannu Bibi, I. L. R. 19 All. 348 ... 98
Brojender Coomar Roy, *In re*, B. L. R. Sup. Vol. 728 ; 7 Suth. W. R. 529, referred to 95
Brooks *v.* Marbury, 11 Wheaton 78 299
Brown *v.* Dean, [1910] A. C. 373 70
Brown *v.* McLachlan, L. R. 4 P. C. 543 131
Buckinghamshire Country Council *In re*, *v.* Hartfordshire County Council, [1899] 1 Q. B. 515 423
Budhu Lal *v.* Chattu Gope, I. L. R. 44 Calc. 804, 21 C. W. N. 269 ... ... 128, 309, 507
Bullock *v.* The London General Omnibus Co., [1907] 1 K. B. 264 116
Bullock Co. *v.* Westing House Co. 63 C. C. A. 607 ; 194 U. S. 636 243
Bulwant Singh *v.* Chittan Singh, 3 N. W. P. H. C. R. 27 ... 316
Butoolun *v.* Koolsoom, 25 Suth. W. R. 444 882

C

C. Groom, Ld., *v.* Barber, [1915] 1 K. B. 316 56
Cann *v.* Cann, 1 P. Williams (Ch.), 567 225
Cargo S. S. *Rappenfels Re*, I. L. R. 42 Calc. 334 57
Celluloid Co. *v.* Chrolithian Co. 24 Fed. 585 243
Chajmal Das *v.* Jagdamba Prasad, I. L. R. 11 All. 408 ... 100
Chalakonda Alasani *v.* Chalakonda Ratnachalam, 2 Mad. H. C 56 668
Chalho Singh v. Jharo Singh, I. L. R. 39 Calc. 995, referred to ... 159
Chamatkar Mohiney Debee *v.* Mohesh Chunder Bose, I. L. R. 26 Calc. 651 N., followed 689
Chandi Charan Giri *v.* Godadhar Pradhan, 22 C. W. N. 165, referred to 585
Charlton's Case, 2 My. & Cr. 316 241
Cheltenham &c. Railway &c. Co. *In re*, L. R. 8 Eq. 580 ... 246
Chengiah *v.* Damara, 15 I. C. 445 473
Cheshire *v.* Strauss, 12 T. L. R. 291, referred to ... 170, 245
Chhatrapat Singh *v.* Gopi Chand Bothra, I. L. R. 26 Calc. 750, referred to 294
Chiles *In re*, 22 Wallace 157 243
Chotalal Chunilal *v.* Bai Kabubai, I. L. R. 22 Bom. 261 ... 863
Christensen Engineering Co. *In re*, 194 U. S. 458 242
Chulhan Mahton *v.* Tiluk Dari Singh, I. L. R. 11 Calc. 175 ; I. L. R. 17 Calc. 131 262
Chunder Coomar Mitter *v.* Sibsundari Dassee, I. L. R. 8 Calc. 631 445
Clarke's Design, *In re*, [1896] 2 Ch. 38 611
Clemens Horst Co. *v.* Biddel Brothers, [1912] A. C. 18 ... 53
Clemonston *v.* Blessig, 11 Exch. 135 ; 105 R. R. 451 ... 56
Cohen *v.* Nursing Dass Auddy, I. L. R. 19 Calc. 201 ... 498
Coles and Ravensnear, *In re*, [1907] 1 K. B. 1 99

PAGE.

Collector of Moradabad *v.* Muhammad Daim, I. L. R. 2 All. 196, referred to 653
Commissioners of Inland Revenue *v.* Horbert and Others. [1913] A. C. 326 412
Compania Sansinena de Carnes Congeladas *v.* Houlder Bros. & Co., Ld., [1910] 2 K. B. 354 116
Conner *v.* Fitzgerald, L. R. 11 Ir. 106 166
Cornish *In re*, 9 T. L. R. 196 243
Corsican Prince, *The*, [1916] P. 195 35
Cropper *v.* Smith, 26 Ch. D. 700 311

D

Dalglish *v.* Guzuffar Hassain, I. L. R. 23 Calc. 427 ... 291
Dattoo valad Totaram *v.* Ram Chandra Totaram, I. L. R. 30 Bom. 119 321
Daw *v.* Eley, L. R. 7 Eq. 49, referred to 170, 207
Day *v.* Longhurst, 62 L. J. Ch. 334 243
Daya Ram *v.* Sohel Singh, 41 Punj. Rec. 390, referred to ... 450
Dayamayi *v.* Ananda Mohan Roy Chowdhury, I. L. R. 42 Calc. 172, followed 434
Debendra Nath Biswas *v.* Hem Chandra Roy, I. L. R. 31 Calc. 253, referred to 539
Debs *In re*, 150 U. S. 564 243
Deedar Hossein *v.* Zuhooroonnissa, 2 Moo. I. A. 441 ... 456
Denman Company *v.* Westminister Corporation, [1906] 1 Ch. 464 357
Denman & Co., Ld. *v.* Westminister Corporation, [1906] 1 Ch. 464 392
Deo Nandan Pershad *v.* Meghu Mahton, I. L. R. 34 Calc. 57, referred to 469, 474
Desai *v.* Rawal, I. L. R. 21 Bom. 110 291
Desai Himat Singji *v.* Bhavabhai Kayabhai, I. L. R. 4 Bom. 643, distingnished 692
Dhakeswar *v.* Harihar, 21 C. L. J. 104 697
Dhani Ram Shaha *v.* Bhagirath Shaha, I. L. R. 22 Calc. 692 ... 311
Dhunookdharee Lall *v.* Gunput Lall, 11 B. L. R. 201 note; 10 Suth. W. R. 122 669
Diana *The*, 5 Rob. 60, 1 Eng. P. Cas. 424 58
Dickson *v.* Pape, 7 Ir. L. R. 107 355
Din Dayal *v.* Patrakhan, I. L. R. 18 All. 481, referred to ... 520
Din Tarini Debi, *In re*, I. L. R. 15 Calc. 775, discussed ... 698
Donaldson *v.* South Shields Corporation, 68 L. J. Ch. 102 ... 391
Dost Muhammad Khan *v.* Maniram, I. L. R. 29 All. 537, followed 653
Dover, Limited *v.* Nuruberger Celluloid varen Fabrik Gebruder Wolff, [1910] 2 Ch. 25 612
Doyle *v.* London Guarantee Co., 204 U. S. 599 243
Drinqbier *v.* Wood, [1899] 1 Ch. 393 116
Dropadi *v.* Hari Lal, I. L. R. 34 All. 496, distinguished ... 934
Dulhin Mathura Das Koer *v.* Bansidhar Singh, 16 C. W. N 904, referred to 934
Duncan Fox & Co. *v.* Schrempft and Bonke, [1915] 1 K. B. 365, [1915] 3 K. B. 355 56
Durga Charan *v.* Raghunath, 18 C. W. N 55 291
Durga Dat Joshi *v.* Ganesh Dat Joshi, I. L. R. 32 All 305 ... 671

PAGE.

Durga Prasad Sing *v.* Brojo Nath Bose, I. L. R. 39 Calc. 696 ; L. R. 39 I. A. 133, followed 87
Durga Prosonno Ghose *v.* Kali Das Dut, 9 C. L. R. 449 ... 811
Durgozi Row *v.* Fakeer Sahib, I. L. R. 30 Mad. 197 ... 883
Durvasulu Gangadharudu *v.* Durvasulu Narasammah, 7 Mad. H. C. 47 669

E

Eilenbecker *v.* Plymouth Court, 134 U. S. 31 243
Emmens *v.* Pottle, 16 Q. B. D. 354 245
Emperor *v.* Jogendra Nath Ghose, I. L. R. 42 Calc. 240, discussed 825
Emperor *v.* Radhe Halwai, 7 C. W. N. 220, followed ... 558
Empress *v.* Durant, I. L. R. 23 Bom. 213, followed 720
Empress *v.* Mayadeb Gossami, I. L. R. 6 Calc. 762, discussed ... 825
Empress *v.* Rango Timaji, I. L. R. 6 Bom. 402 726
Eranjoli *v.* Franjoli, I. L. R. 7 Mad, 3 287
Esposito *v.* Bowden, 7 E &B. 763 47
Evans *v.* Davis, 19 Ch. D. 747 474

F

Farhall *v.* Farhall, L. R. 7 Ch. 123, referred to 539
Faridunnissa *In re*, I. L. R. 5 All. 92, discussed 698
Fen *v* Smart, 12 East 444 474
Fernby *v.* Limehouse Board of Works, 68 L. J. Ch. 344 ... 392
Fiedler *v.* Banrick Bros, 162 Messouri, App. 528 ; 142 S. W. 1111 255
Fisher *v.* Hays, 19 Blatch 13 ; 6 Fed. 63 243
Forbes *v.* Maharaj Bahadur Singh, I. L. R. 41 Calc. 926, distinguished. 294
Fortuna, *The*, 4 Rob. 278 ; 1 Eng. P. Cas. 392 57
Frakenburg *v.* Great Horseless Carriage Company, [1900] 1 Q. B. 504 115
Frederick Pearson's Registered Designs, 23 Pat. Cas. 738 ... 613
Furtado *v.* Rodgers, 3 Bos. & Pul. 191 ; 6 R. R. 752 54
Futteh Ali *v.* Gunganath, I. L. R. 8 Calc. 113 694

G

Gadicherla Harisaroothama Rao *v.* King Emperor, I. L. R. 32 Mad. 338 253
Galloway *v.* The Mayor and Commonalty of London, L. R. 1 H. L. 34 391
Ganes Chandra Chowdhry *v.* Ram Kumar Chowdhry, 3 B. L. R. A. C. J. 265 317
Ganesh *v.* Sukraj, 14 I. C. 12 292
Ganesh Krishna Kulkarni *v.* Damoo Nathu Shimpi, 18 Bom. L. R. 782 788
Ganpatputaya *v.* The Collector of Kanara, I. L. R. 1 Bom. 7, referred to 653

PAGE.

Gard *v.* The Commissioners of Sewers of the City of London, L. R. 28 Ch. D. 486 ... ... 392, 355
Garuradhwaja Prasad Singh *v.* Superundhwaja Prasad Singh, I. L. R. 23 All. 37 ; L. R. 27 I. A. 238, referred to 836
Gayanoda Bala Dassee *v.* Butto Krista Bairagi, I. L. R. 33 Calc. 1040, referred to 553
Gayratulla Sardar *v.* Girish Chandra Bhaumik, 12 C. W. N. 175 ... 262
Gibbengs *v.* Strong, L. R. 26 Ch. D. 66 819
Giles *v.* Grover, 9 Bing. 128, referred to 653
Girindra Chandra Ganguli *v.* Rajendra Nath Chatterjee, 1 C. W. N. 350, referred to 160
Girraj *v.* Hargobind, I. L. R. 32 All. 125 292
Gobind Sundari Debi *v.* Jagadamba Debi, 6 B. L. R. 168 ... 882
Gobinda Lal Das *v.* Shiba Das Chatterjee, I. L. R. 33 Calc. 1323... 819
Gocool Bagdi *v.* Debendra Nath Sen, 14 C. L. J. 136 ... 758
Gokul Mandar *v.* Pudmanund Singh, I. L. R. 29 Calc. 707 ; L. R. 29 I. A. 196 810
Golap Chand Marwaree *v* Thakurani Mohokoom Kooaree, 1. L. R. 3 Calc. 314, referred to 539
Gompers *v.* Buck's Stove Co., 221 U. S. 418 242
Gonesh Chunder Sikdar *v.* Queen-Empress, I. L. R. 24 Calc. 157, declared obsolete 82, 85
Goodright *v.* Cator, 2 Doug. 477 474
Goodwin *v.* Robarts, L. R. 10 Ex. 337 290
Gopalrav *v.* Trimbakrav, I. L. R. 10 Bom. 598 839
Gopendra Chandra Mitter *v.* Tara Prasanna Mukherjee, 14 C. W. N. 1049, referred to 686
Gora Chand Misser *v.* Baykanto Narayan Singh, 12 B. L. R. 261, referred to 520
Gore *v.* Stacpoole, (1813) Dow. H. L. C. 18 925
Gould, *Ex parte*, 99 Cal. 360 ; 21 L. R. A 751; 37 Am. St. Rep. 57 243
Gower *v.* Couldridge, [1898] 1 Q. B. 348 119
Gramophone Company, Ld., *v.* Magazine Halder Company, 28 Pat. Cas. 221 614
Green *Ex parte*, 7 T. L. R. 411, referred to ... 170, 252
Greenwood *v* Greenwood, 100 L. T. 68 119
Grimwade *v.* The Cheque Bank, Ld. 13 T. L. R. 305 ... 233
Grimwood *v.* Moss, L. R. 7 C. P. 360 474
Griswold *v.* Waddington, 15 Johnson 57 ; 16 Johnson 438 ... 54
Guilford *v.* Mills, 2 Keb. 1 ; T. Raym. 152 254
Gulab Koer *v.* Ramratan Pande, 18 C. W. N. 896 163
Gunga Bishen Bhugut *v.* Raghoonath Ojha, I. L. R. 7 Calc. 381 ... 445
Gunga Kumar Mitter *v.* Asutosh Gossami, I. L. R. 23 Calc. 863 ... 759
Gunnaji Bhawaji *v.* Makanji Khushal Chand, 10 Bom. L. R. 969 310
Gurai *v.* Kharmoni, 19 C. W. N. 1188 292
Gurameah *v.* King-Emperor, 16 C. W. N. 336, approved ... 905

H

Hadjee Ismail Hadjee Hubbeeb *v.* Hadjee Mahomed Hadjee Joosub, 13 B. L. R. 91 ... ... 127, 308
Haig *v.* Brooks, 10 A. & E. 309, referred to 775
Hammersmith and City Railway Co. *v.* Brand, L. R. 4 H. L. 171, distinguished 344, 424

PAGE.

Hannay & Co. *v.* Smurthwaite, [1893] 2 Q. B. 412 ... 132
Hanumantamma *v.* Rami Reddi, I. L. R. 4 Mad. 272 ... 291
Harak Chand Babu *v.* Charu Chandra Singha, 15 C. W. N. 5, referred to 686, 765
Hari Charan Saha *v.* Barankhan, I. L. R. 41 Calc. 746 ... 78
Hari Gobind Adhikari *v.* Akhoy Kumar Mozumdar, I. L. R. 16 Calc. 364, referred to 929
Hari Narayan Singh Deo *v.* Sriram Chakravarti I. L. R 37 Calc. 723, L. R. 37 I. A. 136, followed 87
Hari Pandurang *v.* Secretary of State for India, I. L. R. 27 Bom. 424, distinguished 585
Harmangal Narain Singh *v* Ganaur Singh, 13 C. W. N. 40 ... 750
Harper & Co., Ld. *v.* The Wright and Butler Lamp Manufacturing Company, Ld., 12 Pat. Cas. 483 613
Harrold *v.* Plenty, [1901] 2 Ch. 314., followed 654
Hashim *v.* Abdul, I. L. R. 28 All. 698 291
Hayes *v.* Fisher, 102 U. S. 121 243
Health & Sons, Limited *v.* Rollason, [1898] A. C. 499 ... 615
Hecla Foundry Company *v.* Walker Hunter & Co., 14 App. Cas. 550 614
Henrichs *v.* Bastendroff, 10 Pat. Cas. 160 613
Helmore *v.* Smith, 35 Ch D. 449 242
Hem Chunder Bhunjo *v.* Mon Mohini Dassi, 3 C. W. N. 604, referred to 294
Hem Chandra Soor *v.* Kally Churn Das, I. L. R. 9 Calc. 528 ... 326
Hem Coomaree Dassee *v.* Queen Empress, I. L. R. 24 Calc. 551, discussed 698
Henley & Co., *Re.* L. R. 9 Ch. D. 469, distinguished ... 654
Higham *v.* Ridgway, 10 East 109 ; 2 Smiths L. C. 301 ... 166
Hooley *In re*, 6 Manson 44 255
Horlock *v.* Beal, [1916] 1 A. C. 486 59
Holder Brothers *v.* Public Works Commissioner, [1908] A. C. 276 53
Hunt *v.* Clarke, 58 L. J. Q. B. 490 ; 37 W. R. 724 ... 233, 242
Hurbai *v.* Hiraji Byramji Shanja, I. L. R. 20 Bom. 116 ... 883
Hureehur Mookarjee *v.* Doorga Narain Nag, 11 W. R. 348 ... 290
Hurkissen Dass Serowgee *v.* Nibaran Chunder Banerjee, 6 C. W. N. 27, referred to 775
Hurrish Chunder Chowdhry *v.* Kali Sundery Debi, I. L. R. 9 Calc. 482 115
Hurro Soondery Chowdhrani, *In re*, I. L. R. 4 Calc. 20, discussed 698
Hury Churn *v.* Nimai Chand, I. L. R. 10 Calc. 138 ... 292
Hurryhur Mookhopadhya *v.* Madub Chunder Baboo, 14 Moo. I. A. 152 583

I

Ibrahim Khan Sahib *v.* Ranga Sami Naicken, I. L. R. 28 Mad. 420, followed 653
Imrit *v.* Sirdhari, 15 C. L. J. 7 166
Indar Koer *v.* Baldeo Baksh, 13 Oudh Cas. 248 79
Indigo Company *v.* Ogilvy, [1891] 2 Ch. 31 310
Ireland *v.* Livingston, L. R. 5 E. & I. App. 395 38
Isaacs *v.* Royal Insurance Co,. L. R. 5 Ex. 296, considered ... 481
Ishan Chander Hazra *v.* Rameswar, I. L. R. 24 Calc. 831 ... 117

J

PAGE

Jagar Nath Prasad Singh *v.* Ramavatar Singh, 14 Ind. Cas. 39 ... 78
Janakey Nath Guha *v.* Brojo Lal Guha, I. L. R. 33 Calc. 757 ... 507
Janaki Ammal *v.* Narayanasami, I. L. R. 39 Mad 634 ; L. R. 43 I. A. 207, distinguished 510
Janardhan Krishna Pandhye *v.* Ram Chandra Vithal Ranade, I. L. R. 26 Bom. 317 863
Jankibai *v.* Shrinivas Ganesh, I. L. R. 38 Bom. 120 ... 111, 119
Janson *v.* Driefontein Consolidated Mines, Limited, [1902] A. C. 484 54
Jinnat Ali *v.* Fateh Ali Matbar, 13 C. L. J. 646 ; 15 C. W. N. 332, distinguished 692
Jogendra Nath Sarkar *v.* Provath Nath Chatterjee, 19 C. L. J. 126, followed 631
Jogeshwri *v.* Mahomed, I. L. R. 14 Calc. 33 472
Jogeswar Sahu *v.* Debi Prasad, 5 C. L. J. 555, followed ... 496
Jones *v.* Carter, 15 M. & W. 718 474
Jones, *Ex parte*, 13 Ves. 237 ... ... 208, 245
Joolmutty Bewa *v.* Kali Prasanna Roy, I. L. R. 28 Calc. 127, note 373
Joynarain *v.* Badri Das, 16 C. L. J. 156 694
Jugal Kishore Marwari *v.* Ambika Debi, 16 C. W. N. 882, referred to 786
Juggodish Chunder Biswas *v.* Turrikoollah Sircar, 24 W. R. 90 ... 261
Julmati Biwa *v.* Shaik Nayan, I. L. R. 28 Calc. 127 N ; 4 C. W. N. 803 Note 360
Justices of the Peace for Calcutta *v.* The Oriental Gas Company, 8 B. L R. 433, referred to 115, 309, 818
Jwala Prasad *v.* Saliq Ram, I. L. R. 13 All. 575 929

K

Kadir Bakhsh *v.* Prag Narain, 9 All. L. J. 794, followed ... 469
Kakarla Abbayya *v.* Raja Venkata Papayya Rao. I. L. R. 29 Mad. 24, dissented from 285, 292
Kalanand *v.* Gunput, 16 C. W. N. 104 472
Kalar Singh *v.* Mathura Prasad, 19 C. L. J. 402 ... 262, 281
Kali Krishna Biswas *v.* Ram Chandra Baidya, 21 C. L. J. 487 : 19 C. W. N. 823, followed 770
Kalipada *v.* Shekhar Basini, 24 C. L. J. 235 929
Kallar Singh *v.* Toril Mahton, 1 C. W. N. 24 788
Kamatchinathan Chetty *v.* Emperor, I. L. R. 28 Mad. 308, discussed 825
Kamta Prasad *v.* Saiyed Ahmad, I. L. R. 31 All. 373 ... 704
Karl Ettlinger *v.* Changandas, I. L. R. 40 Bom. 301 ... 58
Karm Bakhsh *v.* Daulat Ram, (1888) P. R. No. 183 94
Karsan *v.* Ganpatram, I. L. R. 22 Bom. 875 788
Kashim Sheik *v.* Prasanna Kumar Mukerjee, I. L. R. 33 Calc. 596 ; 10 C. W. N. 598, dissented from 756
Kassim Ebrahim Saleji *v.* Johurmull Khemka, I. L. R. 43 Calc. 447 498
Kattama Natchiar *v.* Dorasinga Tevar, 15 B. L. R. 83 ; L. R. 2 I. A. 169 512
Kattama Natchiar *v.* Rajah of Shivagunga, 9 Moo. I. A. 539, distinguished 591

PAGE.

Kazi Newaz Khoda *v.* Ram Jadu Dey, I. L. R. 34 Calc. 109 ; 11 C. W. N. 201, referred to 686, 765
Kearney, *Ex parte*, 7 Wheaton 38 243
Kedar Nath *v.* Chandu Mal, I. L.R. 26 All. 25 704
Kesho Prasad Singh *v.* The Board of Revenue, I. L. R. 38 Calc. 553, 612
Kessowji Issur *v.* Great Indian Peninsular Railway Company, L. R. 34 I. A.115 79
Kettra Nath Gangopadhyay *v.* Ushabala Dasi, 18 C. W. N 381 ... 506
Khankar Abdur Rahman *v.* Ali Hafez, I. L. R. 28 Calc. 256 ... 326
Khatija *v.* Shekh Adam Hussenally Vasi, I. L R. 39 Bom. 455, followed 634
Khetra Pal Singh *v.* Kritarthamoyi Dassi, I. L. R. 33 Calc. 566, referred to 294
Kilburn *v.* Ritchie, 2 Calif. 145 ; 56 Am. Dec. 326 165
King *v.* Cotton, (1751) Parker 112, referred to 653
King *v.* Davies, [1906] 1 K. B. 32 208
King *v.* Parke, [1903] 2 K. B. 432 208
King *v.* Stevens, 5 East 244, considered 481
King *v.* The Inhabitants of Hardwick, 11 East 578, referred to ... 160
King-Emperor *v.* Nanda Gopal Roy, 20 C. W. N. 1128, explained and distinguished 720
King-Emperor *v.* Rajani Kanto Koer, 8 C. W. N. 22, followed ... 558
Kirby *v.* School Board of Horngate, [1896] 1 Ch. 437 ... 357
Kishen Pershad Panday *v.* Tiluckdhari Lall, I. L. R. 18 Calc. 182 819
Kokil Ram *v.* Emperor, 6 C. L. J. 710 302
Korapalu *v.* Narayana, I. L. R. 38 Mad. 445 ; 25 Mad. L. J. 315 ... 474
Kowsulliah Sundari *v.* Mukta Sundari, I. L. R. 11 Calc. 588, referred to 159
Kreglinger *v.* New Patagonia Meat and Cold Storage Co., [1914] A. C. 25 299
Kripa Sindhu Mukerjee *v.* Annada Sundari Debi, I. L. R. 35 Calc. 34 ; 6 C. L. J. 273 131
Krishna Chandra Sen *v.* Sushila Soondury Dassee, I. L. R. 26 Calc. 611 ; 3 C. W. N. 608 262
Krishna Gobind Dhur *v.* Hari Churn Dhur, I. L. R. 9 Calc. 367 ... 759
Krisnaji *v.* Wamnaji, I. L. R. 18 Bom. 144 318
Krishnaji Lakshman Rajvade *v.* Sitaram Murarrav Jakhi, I. L. R. 5 Bom. 496 318
Krishnaji Mohadev *v.* Moro Mohadev, I. L. R. 15 Bom. 32 ... 670
Krishnaji Vithal *v.* Bhashkar Rangnath, I. L. R. 4 Bom. 611 ... 788
Kshirode Chunder Ghosal *v.* Saroda Prosad Mitra, 12 C. L. J. 525, referred to 873
Kumar Kalanand Singh *v.* Eastern Mortgage Agency, Ld., Co. 18 C. L. J. 83 262
Kurali Prasad Misser *v.* Anantaram Hajra, 8 B. L. R. 490 ... 81
Kurani *v.* Sajoni Kant, 12 C. W. N. 539 292
Kutubullah Sarkar *v.* Durga Charan Rudra, 13 I. C. 424, followed 631

L

Labouchere *v.* Tupper, 11 Moo. P. C. 198, referred to 539
Lachmin Kuar *v.* Debi Prasad, I. L. R. 20 All. 435 670
Laidley *v.* Gour Gobind Sarkar, I. L. R. 11 Calc. 501 811
Lakshman Mayaram *v.* Jamnabai, I. L. R. 6 Bom. 225 ... 669

PAGE.

Lakshmibai *v.* Haribin Ravji, 9 Bom. H C. R. 1 318
Lal Bahadur *v.* Kanhaiya Lal, I. L. R. 29 All. 244 ; L. R. 34 I. A. 65 735
Lali *v.* Murlidhar, I. L. R. 28 All. 488 ; L. R. 33 I. A. 97, referred to 793
Lalla Saligram Singh *v.* Mohunt Ramgir, 3 C. W. N. 311, followed 770
Lalman *v.* Nandalal, 20 I. C. 894 ; 17 Oudh Cas. 1 ... 292
Lancaster *v.* Moss, 15 T. L. R. 476 310
Legal Remembrancer *v.* Chema Nashya, I. L. R. 25 Calc. 413, referred to 558
Legal Remembrancer *v.* Mati Lal Ghose and Others, I. L. R. 41 Calc. 173, referred to 170
Lincoln *v.* Wright, 4 De Gex & J. 16 327
Littler *v.* Thomson, 2 Beav. 129 246
Long Eaton Recreation Ground Co. *v.* The Midland Railway Co., [1902] K. B. 574 357
Loundon *v.* Lynn, 1 H. Bl. 206 255
Lovelock and Lewis *v.* Malabar Timber and Saw Mills, 13 Mad. L. T. 282 131
Lukhee Kant Doss Chowdhry *v.* Sumeeroddi Tustar, 21 W. R. 208 318

M

Ma Me Gale *v.* Ma Sa Yi, I. L. R. 32 Calc. 219 ; L. R. 32 I. A. 72, followed 1
Ma Ywet *v.* Ma Me, I. L. R. 36 Calc. 978, L. R. 36 I. A. 192, followed 1
Mafazzal Hossein *v.* Basid Sheik, I. L. R. 34 Calc. 36 ... 883
Mahadeo *v.* Nabi Baksh, 25 I. C. 164 292
Mahamaya *v.* Haridas, I. L. R. 42 Calc. 455 ... 291, 475
Maharaj Bahadur Singh *v.* Forbes, I. L. R. 35 Calc. 737 ... 298
Maharajah Ishuree Pershad Narain Singh *v.* Chutterput Singh, 3 Moo. P. C. 100 131
Maharani of Burdwan *v.* Krishna Kamini Dasi, I. L, R. 14 Calc. 365 ; L. R. 14 I. A. 20 374
Mahatala Bibee *v.* Haleemoozaman, 10 C. L. R. 293 ... 879
Mahomed Ali Hossein *v.* Nazar Ali, I. L. R. 28 Calc. 289 ... 326
Mahomed Fayez Chowdhry *v.* Jamoo Gazee, I. L. R. 8 Calc. 730 262
Mahomed Sidick *v.* Haji Ahmed, I. L. R. 10 Bom 1 ... 456
Mahomed Wahiduddin *v.* Hakiman, I. L. R. 25 Calc. 757 ... 507
Majidan *v.* Ram Narain, I. L. R. 26 All. 22 883
Makund *v.* Krishna, 9 I. C. 839 292
Manindra *v.* Jamahir, I. L. R. 32 Calc. 643 694
Manjuluri *v.* Singumakanti, 18 Mad. L. T. 200 938
Markt & Co., Ld. *v.* Knight Steamship Co., Ld., [1910] 2 K. B. 1021 116
Marquis of Townshend, *In re*, 22 T. L. R. 341 207
Martin *v.* Mackonochie, 3 Q. B. D. 730 251
Martindale, *In re*, [1894] 3 Ch. 193 ... ... 207, 243
Mata Din *v.* Ahmad Ali, I. L. R. 34, All. 213 ; L. R. 39 I. A. 49 referred to and discussed 879

PAGE.

Matangini Chaudhurani *v.* Sreenath Das, 7 C. W. N. 552, referred to 151
Mathooranath *v.* Kristo Kumar, I. L. R. 4 Calc. 369 ... 694
Mathura Prasad *v.* Tota Singh, I. L. R. 40 Calc. 806 ; 16 C. L. J. 296 262
Mathura Sundari Dasi *v.* Haran Chandra Saha, I. L. R. 43 Calc. 857 ... ... 115, 309
Mathura Sundari Dasi *v.* Haran Chandra Saha, I. L. R. 43 Calc. 857, distinguished 818
Mati Lal Chandra *v.* Emperor, I. L. R. 39 Calc. 1053, declared obsolete 82, 85
Maung Bin *v.* Ma Hlaing, 3 L. B. Rul. 100 321
Maung Shwe Thwe *v.* Ma Saing, (1899) 2, U. B. Rul. (1897—1901) 135, referred to 2
Mavula Ammal *v.* Mavula Maracoir, I. L. R. 30 Mad. 212, referred to 520
McDermott *v.* Judges of British Guiana, L. R. 2 P. C. 341 ... 237
McLeod *v.* St Aubyn, [1899] A. C. 549, referred to ... 170
Meajan Matbar *v.* Alimuddi, I. L. R 44 Calc. 130, referred to ... 159
Megh Lal Pandey *v.* Rajkumar Thakur, I. L. R. 34 Calc. 358, overruled 87
Mellor *v.* Sidebottom, 5 Ch. D. 342 118
Mersey Steel and Iron Co. *v.* Naylor Benzen & Co., L. R. 9 Q. B. D. 648 ; L. R. 9 A. C. 434, referred to 653
Metropolitan Board of Works *v.* Owen McCarthy, L. R. 7 H. L. 243, explained 344
Midgley *v.* Crowther, [1895] 2 Ch. 56 547
Miller *v.* Madho Das, L. R. 23 I. A. 106 167
Milroy *v.* Lord, 4 De G. F. & J. 264 ... ... 434, 441
Minakshi Naidu *v.* Subramaniya Sastri, I. L. R. 11 Mad. 26 ; L R. 14 I. A. 160, referred to 520
Mirabita *v.* The Imperial Ottoman Bank, L. R. 3 Ex. D. 164 ... 36
Mirabivi *v.* Vellayanna, I. L. R. 8 Mad. 464, referred to 291, 451
Mohendra Nath Mookerjee *v.* Kali Proshad Johari, I. L. R. 30 Calc. 265, referred to 920
Mohesh Chunder Addy *v.* Manick Lall Addy, I. L. R. 26 Calc. 650, followed 689
Mohesh Chunder Dhal *v.* Sivanantha Satrughan Dhal, I. L. R. 29 Calc. 343 ; L. R. 29 I. A. 62 455
Mohesh Chunder Roy *v.* Chunder Mohun Roy, 14 B. L. R. 273 ; 23 Suth. W. R. 78, approved and followed 17
Moonshee Buzloor Ruheem *v.* Shum Soonnissa Begum, 11 Moo. I. A. 551 316
Moore *v.* Ullcoats Co., [190 ·] 1 Ch. 575 474
Morse *v.* Royal, 12 Ves. 355, referred to 160
Mothur Chandra Majumdar *v.* Tara Sunkar Ghose, 7 C. W. N. 440, distinguished 638
Motichand *v.* Bajrang, 16 C. L. J. 148 694
Moufuz Ali *v.* Brij Nand Kirat, (1915) P. L. R. 45, referred to ... 520
Moult *v.* Halliday, [1898] 1 Q. B. 125 290
Moyna Bibi *v.* Banku Behari Biswas, I. L. R. 29 Calc. 473 ... 883
Muhammad Kamil *v.* Imtiaz Fatima, I. L. R. 31 All. 557 ... 289
Muhtaboo *v.* Gunesh Lal, (1854) (Beng.) S. D. A. 329, followed ... 631
Mukhoda Soondury Dasi *v.* Ram Churn Karmokar, I. L. R. 8 Calc. 871 318

PAGE.

Mullee, *In re*, 7 Blatch 23 ; 17 Fed. Cas. 9911 243
Mullick Kefait Hossein *v.* Sheo Pershad Singh, I. L. R. 23 Calc. 821 115
Munday *v.* South Metropolitan Electric Light Co., Ld., 29 I. L. R. 346 133
Mungul Pershad Dichit *v.* Girja Kant Lahiri, I. L. R. 8 Calc. 51, distinguished 530
Murarji Gokuldas *v.* Parvatibai, I. L. R. 1 Bom. 177, approved and followed 17
Murugesa Mudaliar *v.* Jattaram Davy, I. L. R. 23 Mad. 621 ... 99

N

Narasimha Chetti *v.* Vijapala Naiuar, 27 Ind. Cas. 944, approved... 786
Narayan Parmanand *v.* Nagindas Bhaidas, I. L. R. 30 Bom. 113, referred to 520
Narendra Kumar Ghose *v.* Gora Chand Poddar, I. L. R. 33 Calc. 683 262
Naresh Chandra Bose *v.* Hira Lal Bose, I. L. R. 43 Calc. 239 ... 587
Narsingh Das *v.* Mangal Dubey, I. L. R. 5 All. 163 121
Natwar *v.* Alkhu, 11 All. L. J. 129 166
Nawab Mir *v.* Partap, I. L. R. 6 Bom. 244 694
Nelson *v.* Dahl, 12 Ch. D. 568 289
Nevill *v.* John Bennett & Sons, 15 Pat. Cas. 412 613
New Orleans *v.* Steam Ship Co., 20 Wallace, 387 243
New South Wales Taxation Commissioners *v.* Palmer, [1907] A. C. 179, distinguished 654
New York Life Insurance Co. *v.* Statham, 93 U. S. 24 ... 54
Nibaran Chandra Chakrabarty *v.* Akshoy Kumar Banerjee, 21 C. W. N, 948, referred to 336, 341
Nisith C. Sen, *In re*, I. L. R., 39 Calc. 754, followed ... 950
Nissim Isaac Bekhor *v.* Haji Sultanali Shastary, I. L. R. 40 Bom. 11 56
Nizamuddin Shah *v.* Anandi Prasad, I. L. R., 18 All. 324 ... 883
Nobbo Kissen Singh *v.* Kaminee Dassee, B. L. R. Sup. Vol. 349 ; 2 Suth., W. R. Mis. 85, followed 95
Nogendra Chunder Mittra *v.* Kishen Soonduree Dassee, 19 Suth. W. R. 133 ; S. C. Sreenarain Mitter *v.* Kishen Soondaree Dassee, L. R. I. A. Sup. Vol. 149 ; 11 B. L. R. 171 ... 596
Nundo Kumar Nasker *v* Banomali Gayan, I. L. R. 29 Calc. 871 117

O

O'Neal *v.* U. S., 190 U. S. 36 243
O'Shea *v.* O'Shea, 15 Prob. Div. 59 242
Onslow's Case, L. R. 9 Q. B. 219 241

P

Padarath Halwai *v.* Ram Nain Upadhia, I. L. R. 37 All. 474 ; L. R. 42 I. A. 163, distinguished 749
Padmanabhaya *v.* Ranga, I. L. R. 34 Mad. 161 ; 20 Mad. L. J. 930 473

PAGE.

Palakdhari Rai *v* Manners, I. L. R. 23 Calc. 179 291
Pall Mall Gazette, *In re*, 11 T. L. R. 122 233
Panchcouri *v*. Hari Das, 25 C. L. J. 325 696
Pankhabati *v*. Nani Lal, 19 C. L. J. 72 695
Parbhu Narain *v*. Beni, 14 C. W. N. 361 697
Parchim The, 1 Trehern P. C. 579 56
Park *v*. Lawton, [1911] 1 K. B. 588, referred to 486
Pathummabi *v*. Vittib Ummachabi, I. L. R. 26 Mad. 734 ... 883
Pauliem Valoo Chetty *v*, Pauliem Sooryah Chetty, I. L. R. 1 Mad. 252 ; L. R. 4 I. A. 109 669
Peary Mohan Mukerjee *v*. Jote Kumar Mukerjee, 11 C. W. N. 83 287
Penny and the South Eastern Railway Co., *In the matter of*, 7 El. & Bl. 660 356
People *v*. Stapleton, 18 Colorado 568 ; 23 L. R. A. 787 ; 33 Pacific 167 234
Percival *v*. Nanson, 7 Exch. 1 166
Pertab Deb *v*. Surrup Deb Raikut, 2 S. D. A. Sel. Rep. 249, referred to 836
Perumal *v*. Rajagopala, I. L. R. 13 Mad. 248 929
Pirbhu Narain Singh *v*. Amir Singh, I. L. R. 29 All. 369 ... 704
Pirbhu Narain Singh *v*. Baldeo Misra, I. L. R. 29 All. 260 ... 704
Pirthichand Lal Chowdhry *v*. Basarat Ali, I. L. R. 37 Calc. 30 ; 13 C. W. N. 1149, relied upon 930
Ponnusami Pillai *v*. Samu Ammal, 31 Mad. L. J. 247, approved ... 786
Prafulla Krishna Deb *v*. Nasibannessa Bibi, 24 C. L. J. 331 294, 373, 520
Pramatha Nath Sandal *v*. Dwarka Nath Dey, I. L. R. 23 Calc. 851, referred to 539
Pranjivan Dayaram *v*. Bai Reva, I. L. R. 5 Bom. 482 ... 454
Preonath Mozumdar *v*. Durga Tarini Ghose, 14 C. L. J. 578, referred to 160
Preonath Shaha *v*. Madhu Sudan Bhuiya, I. L. R. 25 Calc. 603 ... 326
Prince Mahomed Buktyar Shah *v*. Rani Dhojamani, 2 C. L. J. 20, referred to 836
Promoda Nath Roy *v*. Asiruddin Mandal, 15 C. W. N. 896, followed 645, 811
Prosonno Coomar Paul Chowdhry *v*. Koylash Chunder Paul Chowdhry, (1867) B. L. R. (F. B.) 759, distinguished... ... 343
Pudmanund Singh Bahadur *v*. Baij Nath Singh, I. L. R. 15 Calc. 828 263
Pugh *v*. Riley Cycle Company, [1912] 1 Ch. 613 614
Purna Chandra Chatterjee *v*. Dinabandhu Mukerjee, I. L. R. 34 Calc. 811 498
Puthia Valappil Barga *v*. Veloth Assenar, I. L. R. 25 Mad. 733, referred to 653

Q

Queen *v*. Barnardo, 23 Q. B. D. 305 242
Queen *v*. Gray, [1900] 2 Q. B. 36, referred to 169
Queen *v*. Halbrook, 3 Q. B. D. 60 ; 13 Cox. 550 253
Queen *v*. Halbrook, 4 Q. B. D. 42 ; 14 Cox. 185 253
Queen *v*. Lefroy, L. R. 8 Q. B. 134 235
Queen *v*. Stranger, L. R. 6 Q. B. 352 250

PAGE.

Queen *v.* The County Court Judge of the County of Staffordshire, 57 L. J. Q. B. 483 233
Queen-Empress *v.* Babu Lal, I. L. R. 6 All. 509, approved ... 557
Queen-Empress *v.* Bhairab Chunder Chuckerbutty, 2 C. W. N. 702, followed 558
Queen-Empress *v.* Croft, I. L. R. 23 Calc. 174, distinguished ... 728
Queen-Empress *v.* Hussein Haji, I. L. R. 25 Bom. 422. referred to 720
Queen-Empress *v.* Mona Puna, I. L. R. 16 Bom. 661, referred to 720
Queen-Empress *v.* Nana, I. L. R. 14 Bom. 260, referred to ... 558
Queen-Empress *v.* Viran, I. L. R. 9 Mad. 224, followed ... 558
Quinn *v.* Leathem [1901] A. C. 495 299
Quinton *v.* Corporation of Bristol, L. R. 17 Eq. 524 ... 391

R

R. *v.* Almon, (1765) Wilmot 243 235
R. *v.* Birmingham Ry. Co. 3 Q. B. 223 255
R. *v.* Dolan, 2 I. R. 260 233
R *v.* Exeter, L. R. 4 Q. B. 344 166
R. *v.* Freeman's Journal, 2 I. R. 82 233
R. *v.* Gutch Fisher, 1 Moo. & Malk. 433 253
R. *v.* Judd, 37 W. R 143 ; 10 Cox 559 252
R. *v.* O'Connell, 5 St. Tr. N. S. 1 ; 11 Cl. & F. 155 ; 65 R. R. 59 ; 1 Cox. C. C. 413 235
R. *v.* Parke, [1903] 2 K. B. 432 245
R. *v.* Staffordshire, 57 L. J. Q. B. 483 242
R *v.* White, Halt on Libel 287 253
R. and N. Modhe *v.* S. Dongre, I. L. R. 5 Bom. 609 318
Radha Charan Ray Chowdhury *v.* Golak Chandra Ghose, I. L. R. 31 Calc. 834 262
Radha Kishore Manikya *v.* Umed Ali, 12 C. W. N. 904, not followed 930
Radha Madhab *v.* Kalpataru, 17 C. L. J. 209 925
Radha Madhub Samonta *v.* Sasti Ram Sen, I. L. R. 26 Calc. 826, discussed 691, 695
Radha Prosad Singh *v.* Bal Kowar Koeri, I. L. R. 17 Calc. 726 ... 261
Radhashyam Kar *v.* Dinabandhu Biswas, 18 C. W. N. 81 ; 18 C. L. J. 533, referred to 934
Ragho Parashram *v.* Vishnu Govind, 5 Bom. L. R. 329 ... 318
Raghoobuns Sahoy *v.* Kokil Singh, I. L. R. 17 Calc. 872, followed 336, 341, 585
Rahim Jan Bibi *v.* Iman Jan, 17 C. L. J. 173, referred to ... 434
Raj Mohan De *v.* Mati Lal Saha, 22 C. L. J. 546 472
Raj Narain Mitter *v.* Panna Chand Singh, I. L. R. 30 Calc. 213 ; 7 C. W. N. 203 262
Raja Baikunto *v.* Udoy, 2 C. L. J 311 696
Rajani *v.* Ram Nath, 20 C. L. J 200 694
Rajani Khemtawalli *v.* King-Emperor, 14 C. W. N. 404, referred to 301
Rajendra Kishore Adhikari *v.* Chandra Nath Dutt, 12 C. W. N. 878 288
Rajendra Nath Mukherjee *v.* Hira Lal Mukherjee, 14 C. W. N. 995, referred to 686
Rakhal Chandra Chowdhuri *v.* The Secretary of State for India, I. L. R. 12 Calc. 603, followed 496

PAGE.

Rakhal Das Mukerjee *v.* Madhab Chandra Singha, 13 C. L. J. 109, referred to 765
Rakken *v.* Alagappudayan, I. L. R. 16 Mad. 80 326
Ram Bhurosee Singh *v.* Bissesser Narain Mahata, 18 W. R. 454, dissented from 920
Ram Bilash *v.* Lal Bahadur, I. L. R. 30 All. 311 291
Ram Chand *v.* Pitam Mal, I. L. R. 10 All. 506, referred to ... 780
Ram Charan Sannyal *v.* Anukul Chandra Acharjya, I. L. R. 34 Calc. 65 883
Ram Harak *v.* Issur, 3 I. C. 558 293
Ram Narain Joshi *v.* Parmeswar Narain Mahta, I. L. R. 30 Calc. 309 ; L. R. 30 I. A. 20 100
Ram Ranjan Chakravarti *v.* Indra Narain Dass, I. L. R 33 Calc. 890, distinguished 703
Rama Chandra *v.* Pitchai Kanni, I. L. R. 7 Mad. 434, followed ... 653
Ramalakshmi Ammal *v.* Sivanatha Perumal Sethurayar, 14 Moo I. A. 570, referred to 451, 836
Ramani Debi *v.* Kumud Bandhu Mookerjee, 14 C. W. N. 924 ... 864
Rama Swami *v.* Lokanada, I. L. R. 9 Mad. 387 253
Rambehari Sarkar *v.* Surendra Nath Ghose, 19 C. L. J. 34, referred to 920
Ramji Ram *v.* Sariq Ram, 14 C. L. J. 198 595
Ramjiwan Mal *v.* Chand Mal, I. L. R. 10 All 587 98
Ramkrishna *v.* Baburaya, 23 Mad. L. J. 715 474
Ranjit Misser *v.* Ramudar Singh, 16 C. L. J. 77, referred to ... 927
Ranjit Singh *v.* Kali Dasi Debi, I. L. R. 44 Calc. 841 ; 21 C. W. N. 609, followed 516, 689, 765
Read *v.* Bishop of Lincoln, [1892] A. C. 644 456
Read and Greswell's Designs, *In re*, 42 Ch. D. 260 614
Realty Corporation, *In re*, 108 N. Y. Sup. 551 255
Reg *v.* Judd, 37 W. R. (Eng.) 143, referred to 170
Reg *v.* Narayan Sundar, 5 Bom. H. C. R. 1, followed ... 720
Rex *v.* Wales, 16 East 278, distinguished 654
Rex *v.* Walter, 3 Esp. 21 253
Richards *v.* Delbridge, L. R. 18 Eq. 11 distinguished ... 434
Roberts *v.* Davey, 4 B. & Ad. 664 474
Rogers *v* Davis, 8 Ir. L. R. 399, considered 481
Roland *The*, 1 Trehern P. C. 188 58
Rollason's Registered Design, *In the matter of*, [1898] 1 Ch. 237 ; 15 Pat. Cas. 441 613
Rolls *v.* School Board for London, 27 Ch. D. 639 405
Romanath Paul v. Kanai Lal Dey, 7 C. W. N. 104, referred to ... 539
Romesh Chandra Sen, *In re*, 16 C. W. N 472, followed ... 950

S

Sadler *v.* The Great Western Railway Co., [1896] A. C. 450 ... 115
Salisbury *v.* Gladstone, 9 H. L. C. 692, referred to ... 475
Samrun Singh *v.* Khedun Singh, 2 S. D. A. Sel. Rep. 116, referred to 836
Sandback Charity Trustees *v.* North Staffordshire Railway Co., 3 Q. B. D. 1 506
Sarabjit Partap Bahadur Sahi *v.* Indrajit Partap Bahadur Sahi, I. L. R. 27 All. 203 840

PAGE.

Sarala Subba Rau *v.* Kamsala Timmayya, I. L. R. 31 Mad. 5 ... 788
Sarala Sundari Dasi *v.* Sarada Prosad Sur, 2 C. L. J. 602 ... 120
Sarat Chandra Banerjee *v.* Nani Mohan Banerjee, I. L. R. 36 Calc. 799, referred to 862, 865
Sarat Chandra Bisu *v.* Tarini Prasad Pal Chowdhry, I. L. R. 34 Calc. 491 788
Sarat Chandra Dey *v.* Gopal Chandra Laha, I. L. R. 20 Calc. 296 ; L. R. 19 I. A. 203 914
Sarat Chandra Ghosh *v.* Sham Chand Singh Roy, 16 C. L. J. 71 262
Sarbadhicary, *In re*, L. R. 34 I. A. 41 ; I. L. R. 29 All. 95 ... 233
Sardhari Lal *v.* Ambika Pershad, I. L. R. 15 Calc. 521 : L. R. 15 I. A. 123, referred to 786
Sariatullah *v.* Pran Nath, I. L. R. 26 Calc. 184 291
Shashti Charan Chatterjee *v.* Tarak Chandra Chatterjee, 8 B. L. R. 315 597
Sasi Bhushan Bose *v.* Maharaja Sir Manindra Chandra Nandy, 24 C. L. J. 448, followed 634
Sasi Bhusan Mookerjee *v.* Radha Nath Bose, 20 C. L. J. 433 referred to 520
Sasirama Kumari *v.* Meherban Khan, 13 C. L. J. 243, referred to 780
Satish Chandra Roy *v.* King-Emperor, 17 C. W. N. 939, declared obsolete 82
Satya Bhusan *v.* Krishna Kali, 20 C. L. J. 196 694
Satya Kumar Banerjee *v.* Satya Kripal Banerjee, 10 C. L. J. 503, followed 634
Satya Prasad Pal Chowdhry *v.* Matilal Pal Chowdhry, I. L. R. 27 Calc. 683, referred to 539
Scales *v.* Pickering. 4 Bing. 448 357
Schreiber *v.* Garden, 137 N. Y. Sup. 747 255
Scott *v.* Scott, [1913] A. C. 417 241
Secretary of State for India *v.* Bombay Landing and Shipping Co., 5 Bom. H. C. R. (O. C.) 23, referred to 653
Secretary of State for India *v.* Digambar Nanda, 27 C. L. J. 336 936
Serjeant *v.* Nash, [1903] 2 K. B. 304 474
Shahbaz *v.* Rahiman, 11 I. C. 536 293
Sham Chand Giri *v.* Bhayaram Panday, I. L. R. 22 Calc. 92 ... 863
Sham Singh *v.* Sant Singh, (1885) P. R. No. 22 99
Sham Sundar Lal *v.* Achhan Kunwar, I. L. R. 21 All. 71 ; L. R. 25 I. A. 183 598
Shamu Patter *v.* Abdul Kadir Ravuthan, I. L. R. 35 Mad. 607 ; L. R. 39 I. A. 35, distinguished 749
Shankarrao Gangadhar *v.* Ramji Harjvan, I. L. R. 28 Bom. 58 ... 81
Sharat Sundari Dabia *v.* Bhobo Pershad Khan Chowdhuri, I. L. R. 13 Calc. 101 759
Sharoop Dass Mondal *v.* Joggessur Roy Chowdhry, I. L. R. 26 Calc. 564, referred to 934, 938
Sharp *v.* Wakefield, [1891] A. C. 173 99
Shashi Bhusan Misra *v.* Jyoti Prashad Singh Deo, I. L. R. 44 Calc. 585 ; L. R. 44 I. A. 46, followed 87
Sheo Prasad *v.* Behari Lal, I. L. R. 25 All. 79 704
Sheo Sohye Roy *v.* Luchmeshur Singh, I. L. R. 10 Calc. 577 ... 759
Sheosagar Singh *v.* Sitaram Singh, I. L. R. 24 Calc. 616 ; L. R 24 I. A. 50, followed 442

PAGE.

Shyam Chand Koondoo *v.* The Land Mortgage Bank of India, Ld., I. L. R. 9 Calc. 695 318
Shyama Charan Mitter *v.* Debendra Nath Mukerjee, I. L. R. 27 Calc. 484, referred to 520
Shyamanand Das Mohapatra *v.* Ramakanta Das Mohapatra, I. L. R. 32 Calc. 6 840
Silas Harding *v.* The Board of Land and Works, L. R. 11 A. C. 208 414
Sitanath *v.* Basudeb, 2 C. L. J. 540 472
Sitanath Shaha *v.* Nobin Chunder Roy, 5 C. L. R. 102 ... 925
Sitaram *v.* Amir Begam, I. L. R. 8 All. 324 883
Sivaram *v.* Alagappa Chetty, (1915) Mad. W. N. 845 ... 474
Skipworth's Case, L. R. 9 Q. B. 230 241
Smith *v.* Blackey, L. R. 2 Q. B. 306 166
Smith *v.* The Justices of Sierra Leone, 3 Moo. P. C. 361 ... 237
Smurthwaite *v.* Hannay, [1894] A. C. 494 115
Soorendro Nath Roy *v.* Heeramonee Burmoneah, 12 Moo. I. A. 81, referred to 450, 839
Soorjomonee Dayee *v.* Suddanund Mohapatter, 12 B. L. R. 304; L. R. I. A. Sup. Vol. 212 445
Sonnum Sookul *v.* Shaikh Elahee Buksh, 7 W. R. 453 ... 262
Special Reference from the Bahama Islands, *In the matter of a*, [1893] A. C. 138 171
Spokes *v.* Banbury Local Board, 11 Jurist N. S. 1010 ... 255
Sreekanta Pershad Hajari *v.* Irshad Ali Sarkar, 16 C. L. J. 225 ... 278
Srimant Roy *v.* Mahadeo Mahata, I. L. R. 31 Calc. 550, referred to 294
Srinivasa Ayyangar *v.* The Secretary of State for India, I. L. R. 38 Mad. 92, referred to 934
St. James Evening Post case, 2 Atk. 469, referred to ... 170
Standard Discount Company *v.* Otard de la Grange, 3 C. P. D 67 114
State *v.* Ry. Co., 73 W. Va. 1; 79 S. E. 834 255
State *v.* Shepherd, 113 Geo. 114; 15 L. R. A. 225 239
Stratton *v.* Meriwether, 154 Ky. 839; S. W. 613 255
Stroud *v.* Lawson, [1898] 2 Q. B. 44 116
Sturla *v.* Freccia, L. R. 5 A. C. 623 249
Subhadra *v.* Tribhuban, 15 I. C. 247 291
Subrahmania Ayyar *v.* King-Emperor, I. L. R. 25 Mad. 61, referred to 115, 720
Sultan *v.* Ala Bakhsh, (1893) P. R. No. 45 99
Sumbhoo Lal *v.* Collector of Surat, 8 Moo. I. A. 1 871
Sundaralingaswami Kamaya Naik *v.* Ramaswami Kamaya Naik, I. L. R. 22 Mad. 515; L. R. 26 I. A. 55 455
Suraj Narain *v.* Ratan Lal, I. L. R. 40 All. 159; L. R. 44 I. A. 201, followed 734
Surendra Nath Banerjee *v.* The Chief Justice and Judges of the High Court at Fort William in Bengal, I. L. R. 10 Calc. 109; L. R. 10 I. A. 171, referred to 169
Suri Bhatta *v.* Sitarama Bhatta, I. L. R. 7 Mad. 195 99
Sussex Peerage Case, 11 Cl. & F. 85 412
Swarnamoyee *v.* Hari Das, 6 C. W. N. 903 694
Syed Abdulla *v.* Hurkishen Singh, 2 C. L. J. 490 317
Syed Ali *v.* Gopal Dass, 13 W. R. 420 290
Syedun *v.* Velayet Ali Khan, 17 Suth. W. R. 239 883

T

	PAGE.
Tamplin Steamship Co. Ld. *v.* Anglo Mexican Petroleum Products Co., Ld., [1916] 2 A. C.	397
Tanistry Case, (1608) Davis 78	480
Thakur Prasad *v.* Panno Lal, I. L. R. 35 All. 410	938
Thamman Pande *v.* The Maharajah of Vizinagram, I. L. R. 29 All. 593	759
Thomas *v.* Daw, L. R. 2 Ch. App. 1	394
Thomas Souza *v.* Gulam Moidin Beari, I. L. R. 26 Mad. 438, referred to	520
Thomson *v.* London County Council, [1899] 1 Q. B. 840 ...	117
Thornton *v.* Emperor, I. L. R. 38 Calc. 415, followed ...	430
Thotolli Kotilan Ali Yumma *v.* Kunhammad, I. L. R. 34 Mad. 527	883
Throp *v.* Holdsworth. 3 Ch. D. 637	140
Tichborne *v.* Tichborne, L. R. 7 Eq. 55 ; 15 W. R. 1072 ...	245
Tildesley *v.* Harper, 10 Ch. D. 393	310
Tilukdari Singh *v.* Chulhan Mahton, I. L. R. 17 Calc. 131 ...	270
Times Cold Storage Company *v.* Lowther and Blankley, [1911] 2 K. B. 100	116
Tinsley *v.* Anderson, 171 U. S. 101	243
Toolsee Money Dassee *v.* Sudevi Dasee, I. L. R. 26 Calc. 361 ...	507
Tribhuwandas Kalliandas Gajjar *v.* Jivanchand Lallubhai, I. L. R. 35 Bom. 196	506
Trustees for the Improvement of Calcutta *v.* Chandra Kanta Ghosh I. L. R. 44 Calc 219, overruled	343
Trustees for the Improvement of Calcutta *v.* Chandra Kanta Ghosh, I. L. R. 44 Calc. 219	170
Tulijaram Row *v.* Alagappa Chettiar, I. L. R. 35 Mad. 1 ...	126
Turnbull & Co. *v.* Duval, [1902] A. C. 429	79
Twilling Riget, *The*, 5 Rob. 82 ; 1 Eng. P. Cas. 430 ...	57
Tyler & Sons *v.* Sharpe Brothers & Co. 11 Pat. Cas. 35 ...	613
Tyson *v.* Smith, 9 Ad. & El. 406 ; 1 R. R. 539 ...	454, 475

U

U. S. *v.* Burr, 4 Cranch 470	299
U. S. *v.* Memphis Ry. Co. 6 Fed. 237	255
Udoy Narain Jana *v.* The Secretary of State for India in Council, (1915) S. A. No. 44 of 1912 (unreported), referred to ...	867
Umabai *v.* Bhan Balwant, I. L. R. 34 Bom. 353, dissented from ...	111
Umabai *v.* Vithal, I. L. R. 33 Bom. 293	117
Umacharan Chatterjee *v.* Heron Moyee Debi, 18 C. W. N. 770, referred to	786
Umed Ali Bhuyan *v* Raj Laksmi Debya, I. L. R. 33 Calc. 84 ...	498
Ummi Begam *v.* Kesho Das, I. L. R. 30 All. 462	883
Umrithnath Chowdhury *v.* Goureenath Chowdhury, 13 Moo. I. A. 542	839
Union *v.* People, 121 Illinois App. 647	255
United Telephone Co. *v.* Donohoe, 31 Ch. D. 399	140
Universities of Oxford and Cambridge *v.* George Gill & Sons, [1899] 1 Ch. 55	116
Upendra Lal Gupta *v.* Meheraj Bibi, 21 C. W. N. 108, explained	260

V

	PAGE.
Vacher & Sons *v.* London Society of Compositors, [1913] A. C. 107	412
Venkapa *v.* Chenbasapa, I. L. R. 4 Bom. 21	788
Venkatramana *v.* Gundaraya, I. L. R. 31 Mad 493	473
Vidyapurna *v.* Rangappayya, 25 Mad. L. J. 486	474
Villers *v.* Beaumont, 1 Vern. 101, referred to	434
Vrow Anna Catharina *The*, 6 Rob. 269 ; 1 Eng., P. C. 552 ...	58
Vrow Henrica *The*, 4 Rob. 343 ; 1 Eng. P. C. 399	58

W

Wala Quadar *v.* Muhammad Azim, 18 Oudh Cas. 168 ...	884
Walker, Hunter & Co. *v.* Falkirk Iron Company, 4 Pat. Cas. 390...	613
Warden *v.* Searls, 121 U. S 14	242
Warham *v.* Selfridge & Co., 30 T. L. R. 344	79
Webb *v.* Manchester and Leeds Railway, 4 My. & Cr. 116 ...	357
Weis & Co. *In re*, [1916] 1 K. B. 346	56
Weis & Co., Limited and Credit Colonial Commercial (Antwerp) *In re*, [1916] 1 K. B. 346	37
Weldon *v.* Neal, 19 Q. B. D. 394	310
West Jersey Co. *v.* Board of Public Works, 58 N. J. L. 536 ; 37 Atl. 578	255
Western Countries Railway *v.* Windsor and Annapolis Railway, 7 A. C. 178...	357
Weston *v.* Peary Mohan Dass, I. L. R. 40 Calc 898, referred to ...	170
William *v.* Banke Behari Pershad Singh, I. L. R. 30 Calc. 1021 ; L. R. 30 I. A. 182	596
William Bagaley *The*, 5 Wallace 397	54
William Postlethwaite *v.* John Freeland, 5 App. Cas. 599 ...	289
William Tayler, *in the matter of*, 26 C. L. J. 345	171
Womes Chunder *v.* Chundee Churn, I. L. R. 7 Calc. 293 ...	163
Womes Chunder Goopta *v.* Raj Narain Ray, 10 W. R. 15 ...	759

Y

Yates *v.* Lansing, 5 Johnson N. Y. 282	239
Young *v.* Kershaw, 81 L. T. 531 ; 16 T. L. R. 52	68
Yusuf Gazi *v.* Asmat Mollah, 17 C. W. N. 440, dissented from ...	151

THE

INDIAN LAW REPORTS,

Calcutta Series.

PRIVY COUNCIL.

MAUNG THWE

v.

MAUNG TUN PE.

P.C.*
1917

June 5, 6, 7 ;
July 5.

[ON APPEAL FROM THE CHIEF COURT OF LOWER BURMA.]

Burmese Buddhist Law—Adoption—Kittima adoption—Publicity and notoriety essential—Forfeiture of adoption by Kittima son separating from adoptive parents—Distinction where there are other children—Intention to break tie with adoptive parents—Contest between two claimants each claiming the whole estate.

A child adopted under the Burmese Buddhist law according to the fullest form of adoption, and retaining his status as an adopted child till the death of his adoptive parents, is entitled to inherit their estate as if he were a natural and lawful child, either in the absence of other children or in competition with them. Such a child is called a *kittima* child.

There is no ceremony of adoption, and it is not necessary for one who claims adoption to point to any particular statement made or act done by his adoptive parents on a particular date. But on the other hand the adoption must be a matter of publicity and notoriety.

Ma Me Gale v. *Ma Sa Yi* (1) and *Ma Ywet* v. *Ma Me* (2) followed.

* *Present*: LORD DUNEDIN, SIR JOHN EDGE, MR. AMEER ALI, AND SIR WALTER PHILLIMORE, BART.

(1) (1904) I. L. R. 32 Calc. 219 ; L. R. 32 I. A. 72. (2) (1909) I. L. R. 36 Calc. 978 ; L. R. 36 I. A. 192.

1917

MAUNG THWE v. MAUNG TUN PE.

A *kittima* child may forfeit his right of inheritance by separating from his adoptive parents, this being considered an act of ingratitude : see the texts set forth in section 195 of Gaung's "Digest of Burmese Buddhist Law." These authorities, however, draw a distinction between the cases where there are other children with whom the *kittima* child seeks to compete and share, and cases where he has no such competitor, and in the latter instance allow him to inherit in whole or in part notwithstanding his separation.

The true principle on which the rule of forfeiture rests is that it is a matter of intention. The fact that the child goes to live apart is some evidence of an intention to break the bond ; and it is easier to presume this where the adoptive parents have other children who can perform the duties and receive the estate. The extent of the separation is to be also taken into account. The distance may be so great as to render it impracticable for the child to continue to discharge duties to the adoptive parents, and in that case it probably works a forfeiture. But if the distance be not great, if the separation of residence be with the consent of the adoptive parents, and if the child is ready and willing to discharge filial duties after this separation, the bond is not broken. This is the result of the modern decisions. Chan Toon's "Principles of Buddhist law," 88 to 95 where the authorities are given, and *Maung Shwe Thwe* v. *Ma Saing* (1) referred to.

In this case where each of the parties claimed to be the sole adopted son of the same adoptive parents, and in that capacity to be entitled to succeed to their whole to the exclusion of the other.

Held (reversing the decision of the Chief Court), that on the evidence both the claimants were adopted heirs, and that, it not being contended for the appellant that there would be any legal objection to the widow adopting a second heir, or that the position of a son so adopted would be in any way inferior to that of the first adopted son, they were both entitled to inherit the estate. As in that case both of them had asked for too much, each should bear his own costs of the litigation.

APPEAL No. 45 of 1915 from a judgment and decree (23rd September 1915) of the Chief Court of Lower Burma on its Appellate Side, which reversed a judgment and decree (12th January, and 3rd May, 1911, respectively) of the District Court of Tharrawaddy.

The plaintiff was the appellant to His Majesty in Council.

(1) (1899) 2 U. B. Rul. (1897-1901) 135.

1917

MAUNG THWE v. MAUNG TUN PE.

U Shwe Mya, a Burman Buddhist, and his wife Ma Shwe I, died respectively in March, 1906, and February, 1908, without issue, and leaving considerable property. On the death of Ma Shwe I, the appellant applied to the District Court of Tharrawaddy for the grant to him of letters of administration to the estate on the allegation that he had been adopted by U. Shwe Mya and Ma Shwe I, as a *kittima* son, about 1897. The application was opposed by the respondent Maung Tun Pe who filed a cross application for letters of administration and alleged that he was the only adopted *kittima* son.

After a full hearing of the respective claims by the District Judge, he granted letters of administration to Maung Tun Pe holding that Maung Thwe, the appellant, was not entitled to inherit. The appellant preferred an appeal to the Chief Court of Lower Burma, and that Court refused to interfere with the grant of letters of administration, but held that it was open to the appellant to file a suit in order to establish his alleged adoption.

The suit which gave rise to the present appeal was thereupon brought on 8th July, 1910, by the appellant who alleged in his plaint that he had been publicly adopted by U Shwe Mya and Ma Shwe I in the Burmese year 1259 (1897-98); that from that time they brought him up as their son and heir; that he lived with his adoptive parents for 10 or 11 years when they gave him in marriage; that after his marriage he, with the permission of his adoptive parents, lived with his wife at her mother's house, but continued to perform all the duties of a son towards them; that he had attended them in their last illnesses and performed their funeral ceremonies; and that he was the sole heir to their joint estate. He prayed for a declaration to that effect as being their *kittima* son, and

1917

MAUNG THWE v. MAUNG TUN PE.

for an order that the respondent should make over the property to him.

The respondent, Maung Tun Pe, in his written statement denied all the allegations made by the appellant in his plaint, and claimed that he, Maung Tun Pe, had been adopted by U Shwe Mya in his infancy, and was their only adopted son and heir.

The District Judge decided in favour of the appellant holding that he had been adopted by U Shwe Mya and Ma Shwe I as their *kittima* son; and that he had not by living apart from his adoptive parents after his marriage forfeited his right to inherit. He made a decree in accordance with the declaration asked for in the plaint.

On appeal by Maung Tun Pe, the Chief Court (HARTNOLL J., Offg. C.J., and ORMOND J.) reversed that decision, and held that Maung Thwe had not proved he had been adopted, and ORMOND J. further held that even if adopted he had not discharged the burden which lay on him of showing that he had maintained the filial relationship after he married and lived separately from his alleged adoptive parents.

The Chief Court did not deal with the question of the adoption of Maung Tun Pe.

The evidence is sufficiently stated and discussed in the judgment of the Judicial Committee.

On this appeal,

Gerard S. Sanders, for the appellant.

F. J. Coltman, for the respondent.

[The arguments on either side were mainly on the evidence in the case. But the authorities referred to by the Judicial Committee in their judgment were cited and commented on, as to the Burmese Buddhist Law applicable.]

1917

MAUNG THWE v. MAUNG TUN PE.

July 5.

The judgment of their Lordships was delivered by

SIR WALTER PHILLIMORE. The litigation in this case concerns the succession to the estate of U Shwe Mya and Ma Shwe I, Burmans, professing the Buddhist Faith, a wealthy married couple who died childless; the husband early in 1906, and the wife on the 9th of February, 1908. Upon the death of the latter a contest arose between the claims of Maung Thwe, a nephew of the husband, and Maung Tun Pe, a nephew of the wife, each claiming to be the sole adopted child and to succeed to the exclusion of the other.

After certain abortive police proceedings the contest took a regular shape, Maung Thwe being the applicant for administration and Maung Tun Pe resisting him and setting up his rival claim.

Much evidence was given before the District Judge, and he in the result decreed letters of administration to Maung Tun Pe, upon what ground does not appear.

Maung Thwe, being aggrieved by this decision, appealed to the Chief Court, which refused to hear the case upon the merits or to interfere with the order, the Judges stating that the decision as to administration would not operate as *res judicata*, and that it would be open to Maung Thwe to establish his right in other proceedings.

Thereupon the present proceedings were instituted by Maung Thwe against Maung Tun Pe as administrator, Maung Thwe setting forth his title as an adopted son and sole heir to the estate, complaining that Maung Tun Pe wrongfully refused to deliver the estate to him, and praying for a declaration that he was the sole heir and for consequential relief.

Maung Tun Pe put in a defence, in which he denied the plaintiff's adoption and all the other allegations in the plaintiff's claim, stated that he was the only adopted son and heir, having been adopted in his

1917

MAUNG THWE v. MAUNG TUN PE.

infancy, and prayed that the suit might be dismissed.

The District Judge, who was not the same Judge before whom the administration proceedings had been taken, framed three issues, which were as follows :—

"1. Who of the claimants to the estate should be recognised by Buddhist law of inheritance as heir to the estate of deceased U Shwe Mya and Ma Shwe I ?

2. Have either or both of them been adopted ?

3. What is the extent and value of the estate of the deceased U Shwe Mya and Ma Shwe I ?"

By agreement between the parties the evidence in the previous case was read as evidence in this case, some of the witnesses being further examined and cross-examined, and one or two fresh witnesses being added.

By his judgment dated the 12th January, 1911, the District Judge declared that Maung Thwe was the sole adopted *kittima* son of the deceased couple and their sole heir, and directed consequential accounts and enquiries. And by a subsequent order, dated the 3rd May, he directed Maung Tun Pe to transfer to Maung Thwe the property of which he had become possessed as administrator.

From these decrees an appeal was taken to the Chief Court of Lower Burma, which, by its judgment dated the 23rd September, 1913, allowed the appeal, reversed the decrees, and dismissed Maung Thwe's suit with costs in both Courts.

The Chief Court found that Maung Thwe had not proved his adoption, and that it became therefore unnecessary to decide whether Maung Tun Pe had or had not proved his adoption, as he was in possession and the plaintiff had failed to prove a title against him.

From this judgment of the Chief Court Maung Thwe has appealed to His Majesty in Council.

Maung Tun Pe has died during the course of these proceedings, and his legal representatives are now parties to this appeal as respondents.

It appears to their Lordships unfortunate that the Chief Court should have failed to enquire into the rival claim of Maung Tun Pe. The previous decision of the same Court had in substance decided that when the merits of the respective claimants to the beneficial interest in the estate came to be considered, neither was to have an advantage by reason of his having previously obtained administration. And yet, in the present case, the Chief Court treated Maung Tun Pe as if he were in possession and in a position to win his case without any proof of title, upon the mere weakness of the title of the other claimant. The only way to handle the case after the previous decision was to treat the two parties as competitors, starting upon an equal footing.

Their Lordships proceed to examine the case of the two parties upon this principle.

The Burmese Buddhist Law in the matter of adoption and inheritance has been the subject of discussion in several cases in the local Courts and before this Board.

A child adopted according to the fullest form of adoption and retaining his status as an adopted child till the death of his adoptive parents, is entitled to inherit their estate as if he were a natural and lawful child, either in the absence of other children or in competition with them. Such a child is called a *kittima tha* or *kittima* child.

The word is sometimes written *keitima* and seems to be a corruption of the Sanscrit *kritrima*.

There is no ceremony of adoption, and it is not necessary for one who claims adoption, to point to any particular statement or act made by his adoptive

1917

MAUNG THWE v. MAUNG TUN PE.

parents upon a particular date. But on the other hand, the adoption must be a matter of publicity and notoriety.

It is unnecessary to state all the authorities upon this subject, as the matter has twice in recent years come before this Board, in the cases of *Ma Me Gale* v. *Ma Sa Yi* (1) and *Ma Ywet* v. *Ma Me* (2).

To quote a passage from the last judgment, the fact of adoption—

"can either be proved as having taken place on a distinct and specified occasion, or may be inferred from a course of conduct which is inconsistent with any other supposition. But in either case publicity must be given to the relationship, and it is evident that the amount of proof of publicity required will be greater in cases of the latter category, when no distinct occasion can be appealed to."

It is most important that adoption with a view to inheritance, which, in this community, takes the place of testamentary disposition, should be made known to all those likely to be concerned; and their Lordships are anxious in no way to weaken what has been stated to this effect in former decisions.

There is a further principle of law with regard to *kittima* children, to which attention has been drawn in the course of the argument.

A *kittima* child may, according to the authorities, forfeit his right of inheritance by separating from his adoptive parents, this being considered an act of ingratitude. The texts are set forth in section 195 of Mr. Gaung's "Digest of Burmese Buddhist Law."

These authorities, however, draw a distinction between the cases where there are other children with whom the *kittima* child seeks to compete and share, and cases where he has no such competitor, and in the latter instance allow him to inherit in whole or in part notwithstanding his separation.

(1) (1904) I. L. R. 32 Calc. 219; L. R. 32 I. A. 72.

(2) (1909) I. L. R. 36 Calc. 978; L. R. 36 I. A. 192.

This points to the true principle upon which the rule of forfeiture rests. It is a matter of intention. If the *kittima* child goes to live separately from his adoptive parents, it may be that he has shaken off the tie, that he has provided for himself, has discontinued the further performance of duty towards his adoptive parents, and has given up with his duty his claims upon their estate; and it is more easy to presume this when the parents have other children who can perform the duties and receive the estate.

The fact that the child goes to live apart is some evidence of an intention to break the bond. The distance may be so great as to render it impracticable for the child to continue to discharge duties to his adoptive parents, and in that case it probably works a forfeiture.

But if the distance be not great, if the separation of residence be with the consent of the adoptive parents, and if the child is ready and willing to discharge filial duties after this separation, the bond is not broken.

This is the result of the modern decisions which are quoted in Chantoon's "Principles of Buddhist Law," pp. 88 to 95. To these may be added a decision in the Appeal Court of Upper Burma in the case of *Maung Shwe Thwe* v. *Ma Saing* (1).

The general outline of the case on behalf of Maung Thwe was that he was residing with his parents at a distance of about a day's journey from the residence of his adoptive parents, that they came to his house when he was about 17 years old, stayed there for a day or two, and then asked for him in adoption; that certain elders were called in as witnesses of the act of adoption, and that then he went away to his adoptive parents and never returned to his native village.

(1) (1899) 2 U. B. Rul. (1897-1901) 135.

1917

MAUNG THWE v. MAUNG TUN PE.

As he appears to have been born about 1880 that would make the date of his adoption about 1897 or 1898.

In support of this case, besides his own evidence, there was that of his father and the three fellow villagers who had been the witnesses to the adoption, two of whom were people of some position in the village.

He stated that he lived continuously with his adoptive parents till his marriage, which took place when he was about 25, some nine months before the adoptive father died. He relied upon the card of invitation to his marriage which was issued by his adoptive parents, upon statements made at the marriage by the adoptive father to the effect that he was his heir, and upon the testimony of several witnesses, tenants and others, who deposed to statements by the parents that Maung Thwe was their adopted son, and that tenants were to treat him as such, and pay rent to him; and he gave other evidence of repute.

The line taken upon behalf of Maung Tun Pe was that he, as a much younger boy, could know very little about the facts alleged by his rival and required strict proof. There was much criticism of the character and statements of the witnesses for Maung Thwe. It was contended that the statements on the invitation card did not support the view that Maung Thwe was a *kittima* child, and it was pointed out that this card was the only piece of documentary evidence that Maung Thwe could put forward.

It was beyond question that after Maung Thwe's marriage he went to live with his wife's mother. He stated that he continued to discharge such duties as his adoptive parents required of him, and that it was part of the arrangement upon his marriage which was

made with the consent of his adoptive parents, that he should go and live with his mother-in-law.

On the other side it was contended that this separate living was fatal to Maung Thwe's case, either as working a forfeiture, or as showing that there never had been a *kittima* adoption.

The affirmative case of Maung Tun Pe was that his mother lived in the same village as the adoptive parents, and had been visited by them shortly after his birth, when they had agreed to adopt him after he had been reared through his tender years, that the actual adoption began when he was twelve or thirteen years old, from which time he lived sometimes with his own parents and sometimes with his adoptive parents. He said that his adoptive parents paid his school fees, provided for a hospital doctor when he received an injury, and accepted publicly the position of parents when the ceremony of *Shinbyu* was performed. This ceremony, which ends in the boy entering for a time a Buddhist monastery, is one which a Buddhist boy goes through upon attaining puberty.

His case further was that after the adoptive father's death he resided regularly with the widow, and that she put his name into the leases with the tenants, thereby showing either that he was heir to the property, or that he was already entitled to a share as representing his deceased adoptive father.

Maung Tun Pe was said to be about eighteen when the father died in 1906, which makes his birth about 1888.

Maung Thwe said that Maung Tun Pe never lived in the house of the adoptive parents during the father's lifetime.

On the other hand, Maung Tun Pe said that Maung Thwe did not live in the adoptive parents' house, but in his natural parents' village, and only sometimes visited them when on a journey.

1917

MAUNG THWE v. MAUNG TUN PE.

The District Judge accepted the affirmative evidence for Maung Thwe. The Judges in the Chief Court looked at it with more suspicion, and thought that the evidence of the supposed act of adoption was improbable, that the witnesses put forward as elders were not of the authoritative class that one would expect, and that there were discrepancies in the statements of the witnesses as to what took place at the marriage.

They accepted the evidence that for some years before the father's death Maung Thwe had resided a great deal, if not permanently, with the old couple, and helped them in their business, but they said that it would be natural that he, as a nephew, should do this.

The officiating Chief Judge thought that it was not usual to adopt at so late an age as 17, and then observed, somewhat inconsistently, that the old couple might have taken him with them with an intention to adopt him later if he proved suitable, but that when they married him off that idea was abandoned.

The second Judge laid a good deal of stress on Maung Thwe's having gone to live apart from his adoptive parents, and of the acts of the widow indicating that she wished Maung Tun Pe to succeed to her property, as showing that the other had not been adopted.

Both Judges relied upon the language of the card of invitation as being hurtful to the case of Maung Thwe, and the District Judge thought that it was not helpful to his case, though, on the other hand, it was not fatal to it.

The language of this card, omitting unimportant words, is in the translation as follows:—

"As according to the duty of parents it is desired to marry Maung Thwe, the nephew son of U Shwe Mya and Ma Shwe I, and Ma Nyin Ma, daughter of Ma

Shwe Hluing, you are invited to come to the marriage ceremony."

Then the date is given, and the residence of the mother-in-law as the place.

"Nephew son" is a translation of Tu Tha. *Tha* is "son" simply, and *kittima tha* is "fully adopted son."

There is no doubt that Maung Thwe was a nephew, and a "nephew son" was not inapplicable though it might be inadequate.

It is clear that too much stress must not be laid on the word *son*, because the Burmese are proverbially inexact in their terms of relationship; but its use is of some assistance to Maung Thwe's case.

On the other hand, the statement that the marriage was being made according to the duty of parents, seems to show that the old couple who issued the invitation were accepting the duty of parents; and so the District Judge views the phrase.

Their Lordships are unable to hold that much inference can be drawn one way or the other from the language of the invitation card, which seems consistent with either hypothesis; that is, either that Maung Thwe was an adopted son, or that he was a nephew who had been taken by the old couple to live with them, and to whom they had put themselves under obligation, which they were discharging by providing for his marriage. But they would observe that either of these positions—and one of them is certainly right—is inconsistent with the story deposed to by the witnesses for Maung Tun Pe.

Their Lordships see no reason for differing from the District Judge in his acceptance of the story of the witnesses as to the statements made at the marriage by the adoptive father; and if they are accepted, they go a long way to prove the adoption.

1917

MAUNG THWE v. MAUNG TUN PE.

The view taken by the Chief Court is in substance that the proof was insufficient. The officiating Chief Judge has a very long experience of Burmese habits and customs; and it has been urged on behalf of the respondents that his decision upon such a subject is of special authority.

Their Lordships feel the force of this argument; but they would have attached more weight to it if the Chief Judge had examined the case of Maung Tun Pe in the same manner as he has examined the case of Maung Thwe. They are inclined to think that if he had applied the same critical solvent to the one story as to the other, he would have come to the conclusion that neither had proved an adoption; and this is a consequence in itself improbable, and one for which neither side has contended.

As to Maung Thwe living separately after his marriage, it has not been contended before their Lordships that it was a separation which worked a forfeiture, if there had been a prior adoption. It appears that it was always intended that the marriage should be followed by Maung Thwe going to live with his widowed mother-in-law, and the marriage took place not only with the consent but upon the request of the old people, who apparently first came themselves and then sent an intermediary to beg for the hand of the girl. Maung Thwe deposed that he used to help the couple after his marriage, and it was admitted that he was called in by the widow on an occasion when she was in trouble. There was evidence that he and his wife, when the adoptive father was taken ill, went and nursed him till his death; and through his cross-examination no specific failure of duty was put to him.

Upon the whole their Lordships attach no weight to the separate residence, either as working a forfeiture

or (as it was rather put before them) as indicating that there never had been an adoption; and they are of opinion that Maung Thwe did make out that he was an adopted child and an heir to the old couple.

But whether he was the sole adopted child and heir is another question. The District Judge thought that he was, and that Maung Tun Pe had not made out his case; and Maung Tun Pe has not the assistance of any finding in his favour in the Chief Court. But he has strong documentary evidence in the fact of the leases, in which his name appears with that of the widow after the adoptive father's death.

Some, at any rate, of the leases have been proved to be genuine and to have been effected under the authority of the widow. There is a good deal of evidence that the adoptive father took a principal part in the ceremony of *Shinbyu*, though the natural father was also present. The providing of the hospital doctor was proved, and there seems no doubt that, after the adoptive father's death, Maung Tun Pe, having by that time arrived at an age when he could be useful, did most of her ordinary business for the widow.

Maung Tun Pe's case has this weakness, that the supposed original adoption was made without witnesses. The District Judge commented with force upon the fact that the act of adoption—if there was any one single act—was not witnessed by any elder or any other person in authority, and was a wholly private transaction, and he came to the conclusion that there was no adoption by U Shwe Mya. He thought it not improbable that Ma Shwe I may have intended to have adopted Maung Tun Pe after she became a widow, but, having regard to the fact that there was already one adopted son, he thought that more proof than that supplied would be necessary to establish a subsequent adoption by the widow.

1917

MAUNG THWE v. MAUNG TUN PE.

Their Lordships have been informed by counsel for Maung Thwe that he does not contend that there would be any legal objection to the widow adopting a second heir, or that the position of a son so adopted would be in any way inferior to that of the first adopted son.

After consideration of the evidence, they have no doubt, at the death of the widow, Maung Tun Pe was also an adopted son. It would be difficult to fix a date when this adoption began, or to say with certainty, whether it was the act of the couple or of the widow only. The stronger evidence for it is to be found in what happened after the adoptive father's death. This might point to a subsequent adoption, but it would also be consistent with the previous adoption, the evidence for which it has not been so easy to procure.

Upon the whole their Lordships come to the conclusion that both of the claimants were adopted heirs. This being so, either in turn has asked for too much, and each should bear his own costs of the litigation.

Their Lordships will therefore humbly advise His Majesty that the decree of the Chief Court should be reversed, that it should be declared that Maung Thwe and Maung Tun Pe were heirs to the estate of U Shwe Mya and Ma Shwe I as their *kittima* sons, and that the case should be remitted to the District Court with this declaration, and that there be no costs in either of the Courts below or of this appeal.

Appeal allowed.

Solicitors for the appellant: *Bramall & White.*
Solicitor for the respondent: *H. Anderson.*

J. V. W.

PRIVY COUNCIL.

GUNJESHWAR KUNWAR

v.

DURGA PRASHAD SINGH.

P.C.*
1917

June 8, 11—14; *July* 6

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Hindu Law—Inheritance- Exclusion from Inheritance—Mitakshara Law—Blindness, not a disqualification unless congenital.

The appellant, as his only child and heir, sued for the property of her father, a Hindu, who had become blind in the early years of his life, and remained so until his death, and had taken his separate share of the family property under a decree made on a compromise of a suit for partition brought against him by his younger brother, they having lived together as members of a joint family governed by the law of the Mitakshara. The defence by his brother, against whom the suit was brought, was that there had been no partition and that on his brother's death he became entitled to the whole family property by survivorship. He contended that his brother's blindness was congenital which excluded him from inheritance; but that even assuming he was not born blind but became so after birth he was, according to the Mitakshara law of the Benares school, excluded from participation of a share, inasmuch as the blindness occurred before the alleged partition.

Held, that blindness to cause exclusion from inheritance must be congenital. Mere loss of sight which has supervened after birth is not a ground for disqualification. Incurable blindness, if not congenital, is not such an affliction as under the Hindu Law excludes a person from inheriting.

Sarvadhicari's "Hindu Law of Inheritance," page 956, referred to.

Mohesh Chunder Roy v. *Chunder Mohun Roy* (1) and *Murarji Gokuldas* v. *Parvatibai* (2) approved and followed.

* *Present:* LORD DUNEDIN, SIR JOHN EDGE, MR. AMEER ALI AND SIR WALTER PHILLIMORE, BART.

(1) (1874) 14 B. L. R. 273; 23 Suth. W. R. 78

(2) (1876) I. L. R. 1 Bom. 177.

1917

GUNJESHWAR KUNWAR v. DURGA PRASHAD SINGH.

APPEAL No. 29 of 1915 from a judgment and two decrees (7th May 1912) of the High Court at Calcutta which reversed a judgment and decree (31st March 1908) of the Court of the Subordinate Judge of Bankipur. The plaintiff was the appellant to His Majesty in Council.

For the purpose of this report the facts are sufficiently stated in the judgment of the Judicial Committee.

The only question material for this report is whether a member of a joint Hindu family governed by the Mitakshara law, who becomes permanently blind after birth, is excluded by Hindu law from sharing in the family property by reason of a permanent and incurable blindness though not congenital.

The Subordinate Judge decided in favour of the plaintiff, the present appellant, who was the daughter of the blind member of the joint family, holding that he was not born blind. On appeal, the High Court (WOODROFFE and RICHARDSON JJ.) without any finding whether he was born blind or not dismissed the suit on other grounds.

On this appeal,

B. Dube, for the appellant.

De Gruyther, K. C., and *J. M. Parikh*, for the respondents.

The judgment of their Lordships was delivered by

SIR JOHN EDGE. This is an appeal from a decree, dated the 7th May, 1912, of the High Court at Calcutta which reversed a decree, dated the 31st March, 1908, of the Officiating Subordinate Judge of Bankipur and dismissed the suit. The plaintiff who is the appellant here is a minor and is suing by her next friend. The

1917

GUNJESHWAR KUNWAR v. DURGA PRASHAD SINGH.

defendants are Durga Prashad Singh, an uncle of the plaintiff, Mussummat Harbans Kunwar, her mother, and three assignees of the defendant Durga Prashad Singh.

The suit was brought on the 21st July, 1906, to obtain a declaration that a compromise which was entered into between Durga Prashad Singh, who is the first defendant in this suit, and Mussummat Harbans Kunwar, and a decree dated the 30th August, 1904, which was made in pursuance of that compromise, are not binding upon the plaintiff; a declaration that the plaintiff's father, Bishambhar Prashad Singh, was at the time of his death separate from his brother, the defendant, Durga Prashad Singh; a declaration that the defendant, Mussummat Harbans Kunwar, by reason of her conduct in entering into the said compromise, had ceased to be entitled to any rights in the estate of her deceased husband, Bishambhar Prashad Singh, and that the plaintiff was entitled to the present possession of that estate; a declaration of the plaintiff's reversionary right in case she should not be held entitled to the possession of the property in dispute during her mother's lifetime; and for other reliefs. The Subordinate Judge gave the plaintiff a declaration that the compromise and the decree of the 30th August, 1904, which was made on the basis of that compromise, were not binding upon her and, on the ground that the plaintiff was not entitled to get possession of the property during the lifetime of her mother, dismissed the suit so far as the claims for possession and mesne profits were concerned. The High Court in Appeal by its decree dismissed the suit. From that decree of the High Court this appeal has been brought.

The plaintiff and the defendant Durga Prashad Singh are descended from Lal Behari Singh, who died

1917

GUNJESHWAR KUNWAR v. DURGA PRASHAD SINGH.

on the 24th October, 1885, leaving him surviving two sons, then minors, Bishambhar Prashad Singh, the plaintiff's father, and the defendant, Durga Prashad Singh, his mother, Mussummat Gulab Kunwar, and his widow, Mussummat Mohun Kunwar. The family of Lal Behari Sigh was a joint Hindu family, governed by the law of the Mitakshara. Bishambhar Prashad Singh died on the 2nd August, 1902, leaving surviving him only one child, the plaintiff, and Mussummat Harbans Kunwar, his widow. The compromise referred to was made in a suit which Durga Prashad Singh had brought on the 7th May, 1904, against Mussummat Harbans Kunwar, her daughter the plaintiff, then and still a minor, and other persons. In his plaint in that suit Durga Prashad Singh alleged that his brother Bishambhar Prashad Singh had been born blind and was excluded from inheritance to his father's estate by reason of his congenital blindness; that all the proceedings in a suit against Bishambhar Prashad Singh for partition which Durga Prashad Singh's father-in-law, Mahabir Prashad Singh, had, on the 25th January, 1900, brought, assuming to act as his guardian and next friend, were illegal; and that no partition had taken place.

If Bishambar Prashad Singh was not disqualified from sharing in the family properties, he was entitled on separation to a moiety of the property of the joint Hindu family, and if in fact he did, in such circumstances, separate from his brother Durga Prashad Singh, Mussummat Harbans Kunwar was on his death entitled to a Hindu widow's interest in his moiety, and on her death the plaintiff would inherit to her father. By the compromise which is in question in this suit Mussummat Harbans Kunwar for herself and her daughter, the plaintiff, abandoned all claim to the property of Bishambhar Prashad Singh, admitted that

Bishambhar Prashad Singh had been born blind, and was consequently excluded by Hindu Law from all right of inheritance; that he and his brother Durga Prashad Singh had not separated; and that Durga Prashad Singh was entitled to the whole family property by survivorship. By the compromise Durga Prashad Singh gave to Mussummat Harbans Kunwar six villages, representing about one-fourth of the family property for her life, with remainder to the plaintiff, and undertook to pay certain debts.

It has been admitted on both sides that Bishambhar Prashad Singh was in fact blind at the time of his death. The Subordinate Judge found that Bishambhar Prasad Singh was not born blind. He also found that Mussammat Harbans Kunwar, who is a purdanashin lady, was not given a sufficient opportunity of obtaining independent advice as to the terms of the compromise before entering into it. The High Court in the appeal did not expressly find that Bishambhar Prashad Singh had or had not been born blind, but came to the conclusion that Durga Prashad Singh had reasonable grounds for believing that there existed materials for a *bonâ fide* litigation and compromise, and that the question was not whether Durga Prashad Singh was right in his claim that Bishambhar Prashad Singh had been excluded from a right to share in the family property by reason of his having been born blind, but was whether Durga Prashad Singh honestly believed that Bishambhar Prasad Singh had been born blind.

The main questions upon the determination of which the decision of this appeal must, in their Lordships' opinion, depend are, *first*, is a man who is a member of a joint Hindu family, which is governed by the law of the Mitakshara, and who becomes permanently blind after he is born, excluded by Hindu

1917

GUNJESHWAR KUNWAR v. DURGA PRASHAD SINGH.

Law from sharing in the family property by reason of a permanent and incurable blindness which was not congenital; *secondly*, was Bishambhar Prashad Singh, who was the father of the plaintiff, born blind; and, *thirdly*, did Bishambhar Prashad Singh and his brother, the defendant, Durga Prashad Singh, separate and remain separate. The first of these questions is a question of law, the second and third are questions of fact.

It will be convenient to deal at once with the first question, that of law. In his written statement the defendant, Durga Prashad Singh, alleged that Lal Behari Singh died—

"leaving him surviving two sons, namely, the plaintiff's father, Babu Bishambhar Prashad Singh, and this defendant, and Mohun Kunwar, widow, and Gulab Kunwar, mother; but the plaintiff's father never succeeded him, nor could he succeed him, according to law, as he was congenitally blind."

The first ground of Durga Prashad Singh's memorandum of appeal to the High Court was:—

"1st. For that, upon the entire evidence on the record, the Court below ought to have held that Bishambhar Prashad Singh was congenitally blind, and he had no right to succeed to his paternal estate; the reasons assigned by the said Court for holding otherwise are erroneous and unsound."

The 17th ground of that memorandum of appeal was as follows:—

"For that even assuming, without admitting, that Bishambhar was not born blind, but became blind after birth, as alleged by the plaintiff, the Court below ought to have held that, according to the Mitakshara law of the Benares School, he was excluded from participation of a share, inasmuch as the blindness occurred before the alleged partition."

It does not appear that the 17th ground of that memorandum of appeal was relied upon in the High Court, but as the point has been raised and pressed before this Board in this appeal, their Lordships will now deal with it.

The question as to whether blindness which is not congenital excludes by Hindu Law a member of a joint Hindu family from sharing in the family property, does not appear to have been decided by this Board. The text of Manu on this subject, as translated, is as follows: "Eunuchs and outcasts, persons born blind or deaf, mad men, idiots, the dumb, and such as have lost the use of a limb, are excluded from a share of the heritage."

In 1874 the High Court at Calcutta, in *Mohesh Chunder Roy* v. *Chunder Mohun Roy* (1) a case in which the law of the Dayabhaga applied, decided that the blindness which, under the Hindu Law as recognised in Bengal, excludes an afflicted person from inheritance, refers to congenital blindness, and not to loss of sight which supervened after birth. In that case the High Court Judges had before them the text of Manu which is above quoted.

In 1876 the High Court at Bombay in *Murarji Gokuldas* v. *Parvatibai* (2) decided that according to the Hindu Law, as prevailing in the Bombay Presidency, blindness, to cause exclusion from inheritance, must be congenital. In the latter case, Sir Michael Westropp, C.J., in a learned and exhaustive judgment, after considering the texts and authoritative commentaries bearing on the subject, including the text of Manu and the Mitakshara, said that:—

"Upon the best consideration we [he and Sargent J.] have been able to give to this question, we are of opinion that there is a considerable preponderance of authority in favour of the conclusion that blindness, to cause exclusion from inheritance, must be congenital."

The Sanskrit word in the Mitakshara on this subject has been translated as "a blind man." The description "a blind man," if that be the correct

(1) (1874) 14 B. L. R. 273; 23 Suth. W. R. 78.

(2) (1876) I. L. R. 1 Bom. 177.

1917

GUNJESHWAR KUNWAR v. DURGA PRASHAD SINGH.

translation, is somewhat indefinite, and their Lordships consider that, if that be the correct translation it is not to be assumed that the author of the Mitakshara could have intended by the use of an ambiguous description to extend the prohibition of Manu and to exclude from a share in the heritage persons who become blind after they were born.

As was observed by Jackson J., in *Mohesh Chunder Roy* v. *Chunder Mohun Roy* (1) to which reference has been made above: "A rule of Hindu Law which is relied upon as preventing the natural course of inheritance, ought to be clear and unmistakable." Rajkumar Sarvadhikari, in his "Hindu Law of Inheritance," p. 956, says:—

"Blindness, to cause exclusion from inheritance, must be congenital. Mere loss of sight which has supervened after birth is not a ground of disqualification. Incurable blindness, if not congenital, is not such an affliction as, under the Hindu law, excludes a person from inheritance."

The above is, their Lordships hold, the true rule.

The oral evidence on the question as to whether Bishambhar Prashad Singh was born blind is very conflicting, but on the whole their Lordships would be prepared to find on the oral evidence, if it stood alone, that Bishambhar Prashad Singh's blindness was not congenital. There are, however, facts proved by records and other documentary evidence which can lead to no other conclusion than that Bishambhar Prashad Singh was not blind when he was born, and was treated by the family and by others as a person entitled to share in the family property.

[After considering the evidence on which their Lordships found that Bishambhar Prashad Singh was not born blind, and that he and his brother Durga Prashad Singh separated and remained separate, their Lordships' judgment proceeded.]

(1) (1874) 14 B. L. R. 273 ; 23 Suth. W. R. 78.

Mahabir Prashad Singh has not been called as a witness in this suit, nor has his absence been satisfactorily accounted for. On behalf of Durga Prashad Singh it has been suggested that his father-in-law, Mahabir Prashad Singh, was acting in collusion with and in the interests of Bishambhar Prashad Singh—an insinuation which appears to their Lordships to be wholly groundless.

The statement in the plaint that Bishambhar Prashad Singh was blind from birth was irrelevant, and, further, it was inconsistent with the claim that the family property should be partitioned between the brothers.

There was, and could have been, no defence to that suit for partition. Durga Prashad Singh, on whose behalf the suit was brought, was entitled to have his share partitioned off. The suit was compromised and by consent and with the sanction of the Subordinate Judge as to the compromise a decree for partition was made.

In accordance with that decree for partition, the immovable property was partitioned and the shares of the brothers were divided by metes and bounds, the name of each brother was entered in the Land Register in respect of his separated share, and such of the movable property as was capable of being divided was divided between them, and complete separation between them was effected.

It has been said that Mussummat Gulab Kunwar and Mussummat Mohun Kunwar did not know that under the Hindu Law a person who was born blind was thereby disentitled to share in family property. It is inconceivable that ladies in their position could have been in ignorance of that well-known rule of the Hindu Law, and if the evidence, which was given on behalf of Durga Prashad in this suit, was true those

1917

GUNJESHWAR KUNWAR v. DURGA PRASHAD SINGH.

ladies had several male relations and friends who were aware that Bishambhar Prashad Singh was born blind and who must have known what the state of Hindu Law was. It has also been said that the action of Gulab Kunwar and of Mohun Kunwar is explainable on the supposition that they did not wish to deprive Bishambhar Singh of a share in the family property. That is an explanation which their Lordships cannot accept.

If Bishambhar Prashad Singh had been in fact born blind his mother, Mohun Kunwar, and his grandmother, Gulab Kunwar, must have known from the time of his birth that he suffered from congenital blindness. It must have been a fact of which neither of them, nor the plaintiff nor any near relation of the family, could have been in ignorance; but the first time when it was alleged that Bishambhar Prashad Singh had no right to share in the family property, was when Mussummat Harbans Kunwar, after the death of Bishambhar Prashad Singh, applied to the District Judge of Patna for a certificate under Act VII of 1889.

To that application Mussummat Gulab Kunwar, on behalf of Durga Prashad Singh, on the 10th December, 1902, filed an objection in which she stated:—

"3. That the aforesaid Bishambhar Prashad Singh was born blind and died as such. 4. That the aforesaid Bishambhar Prashad Singh had no right to any properties which were ancestral to the family under law, and that the petition is therefore liable to be rejected."

Their Lordships have without any doubt come to the conclusion that Bishambhar Prashad Singh was not born blind, and that Durga Prashad Singh could not possibly have been in ignorance or in doubt as to that fact, and had, when he induced Mussummat Harbans Kunwar to enter into the compromise on behalf of the plaintiff which is in question in this

suit, no honest and *bonâ fide* belief in the claim which he was making. That compromise, and the decree which was made in pursuance of it, could not be allowed to affect in any way the right of the minor, and she was entitled to the declaration which the Subordinate Judge made in her favour. In order to avoid any possible misconception arising as to the meaning of the decree of the Subordinate Judge, the following words—"whose action in connection therewith may be construed as one done for the transfer of the property left by her husband"—must be omitted from that decree. With that omission the decree of the Subordinate Judge should be affirmed, and the decree of the High Court in the respondents' appeal should be set aside with costs. As regards the appellant's appeal to the High Court with reference to the question of possession, the appeal against the High Court's decree was not argued before their Lordships, and under these circumstances the decree of the High Court will stand. The respondents, Durga Prashad Singh, Ritu Singh, Lachmi Narayan Rajput and Tori Mahton, must pay the costs of the appeal to His Majesty in Council and of their appeal to the High Court. Upon the appellant's cross-appeal to the High Court, the High Court made no order as regards the costs, and this decree stands.

Their Lordships will humbly advise His Majesty accordingly.

Appeal allowed.

Solicitors for the appellant: *Barrow, Rogers & Nevill.*

Solicitors for the respondents 1 to 4: *T. L. Wilson & Co.*

J. V. W.

APPEAL FROM ORIGINAL CIVIL.

Before Sanderson C. J. and Mookerjee J.

1917

Feb. 7.

MADHORAM HURDEO DAS

v.

G. C. SETT.*

Sale of Goods—Vendor and purchaser—C. I. F. Contract—Payment to be made after goods had been landed—Breach of Contract—Failure of vendors to deliver bill of lading or goods—Contract of affreightment—Property consigned on enemy vessel—War declared whilst cargo at sea—Capture of vessel and cargo—Adjudication by Prize Court—Condemnation of vessel—Release of cargo—Effect of war on executory contract—Impossibility of performance—Void contract—Contract Act (IX of 1872), s. 56.

On the 2nd February, 1914, the defendant firm agreed to sell to the plaintiffs 150 tons of basic steel bars under a c. i f. contract, free Hooghly. The shipments were to be made in June, July and October and delivery to be completed within three days from the date of the landing of the goods. Furthermore, it was agreed between the parties that 45 days' credit from the date of the delivery of the goods should be allowed to the plaintiffs. In respect of the July shipment, the goods which consisted of partly Belgian and partly German manufacture, were shipped on the 2nd July, 1914, from Antwerp per s.s. *Steinturm*, a German steamer. On the 4th August, 1914, when war was declared between England and Germany, the s.s. *Steinturm* was at sea. She was subsequently captured with her cargo by a British cruiser and taken to Colombo for adjudication. The Prize Court condemned the vessel but released the cargo, which was brought to Calcutta at the expense of Government. The Government, thereupon, notified the vendors that the goods had arrived and the latter immediately communicated with the purchasers asking them to take delivery of the goods on payment of certain extra charges to Government. The plaintiffs having refused to do so, the goods were sold by the defendants on purchasers' account and risk. In a suit for breach of contract and for damages :—

Held, that the variation of the terms as to the time of payment did not alter the nature of the contract as a c. i. f. contract.

*Appeal from Original Civil No. 36 of 1916 in Suit No. 353 of 1915.

1917

MADHORAM HURDEO DAS v. G. C. SETT.

Held, also, that it was an implied part of the contract of the 2nd February, 1914, that the defendants should procure a contract of affreightment under which the goods would be delivered in the Hooghly.

Held, also, that the contract between the plaintiffs and the defendants included the performance of an act (*viz.*, the procuring of the contract of affreightment under which the goods would be delivered in the Hooghly) which after the contract was made became impossible by reason of the outbreak of war, within the meaning of section 56 of the Indian Contract Act and consequently the contract of the 2nd February, 1914, was void.

APPEAL by Madhoram Hurdeo Das, the defendant firm.

G. C. Sett and B. R. Sett carried on business in co-partnership as dealers in iron goods in Calcutta. On the 2nd February, 1914, the firm of Madhoram Hurdeo Das wrote to them as follows :—

"We beg to enter as having sold you through Broker, P. N. Mukerji, 150 tons basic steel bars with usual 10 per cent. 2nd class extras at £5-7-6, per ton c. i. f., *i. e.*, free Hooghly. Shipment in three monthly lots commencing June, *i.e.*, June, July, August, 1914. Delivery to be completed within three days from the date of the landing of the goods. Terms 45 days' credit from the date of the delivery of the goods, failing which due date will be calculated from the due date of the delivery. *i.e.*, three days from the landing of the goods.

This sale is made on the basis of the existing terms and conditions in the contracts for this class of goods as are current in the market. Interest at the rate of 8 per cent. per annum to be charged on any money unpaid after the due date and rebate for payments before the due date will be allowed at the same rates. You have the option to have the goods weighed so as to arrive at the actual weighment and in that case you shall have to notify us, so that we may make necessary arrangements to have our man present. But in any case, claim for weighment will not be entertained, if made after three days after the arrival of the goods in your godown from the jetty, and the invoice weight shall be accepted by you as the correct one. Please confirm."

This letter formed the basis of the contract between the parties. The June shipment arrrived per S.S. *Frankenfels* in due time, but the purchasers having failed to pay and take delivery of the goods under that shipment, a suit was subsequently instituted and

1917

MADHORAM HURDEO DAS v. G. C. SETT.

decreed in favour of the vendors against the purchasers on the 26th January, 1915.

In respect of the July shipment, the goods were purchased from the Belgo-Asiatic Trading Co., and were shipped by them from Antwerp per S.S. *Steinturm*, a German steamer, on the 2nd July, 1914, and consisted of partly Belgian and partly German manufacture. War broke out between England and Germany on the 4th August, 1914, when the S.S. *Steinturm* was at sea. She was subsequently captured by a British cruiser and was taken for adjudication to Colombo, where, on the 25th August, 1914, on the application of the Solicitor-General on behalf of the Crown for an order that the ship be handed over to the custody of the Principal Collector of Customs, the Judge of the Prize Court ordered

"That the following undertaking and decree be entered of record, namely:

The Solicitor-General on behalf of the Crown undertakes that the Crown will restore the ship to its present place, whenever it is called upon to do so by this Court if the Government of Ceylon on behalf of the Crown are allowed to take charge of the ship; and moves that the Crown be allowed to take charge of the ship on these terms.

It is ordered and decreed that the application be allowed, and that the Marshal be directed to let the Government of Ceylon have possession of the ship, after the cargo, goods, wares and merchandise have been warehoused.

It was further directed that the Marshal shall require from any person taking over the ship on behalf of the Government an authority to do so signed by His Excellency the Governor, or by the Colonial Secretary."

On the 31st August, 1914, the purchasers wrote to the vendors stating that they had come to understand that the July shipment had arrived by the S.S. *Steinturm*, that the vendors had not advised them at all about the goods, and that, if the vendors failed to deliver the invoices to them at once they would place the matter in the hands of their Solicitors.

On the 2nd September, 1914, the Prize Court "on hearing the Attorney-General on behalf of the Crown

and on considering the motion for an order to make arrangements for the warehousing at Calcutta of all cargo on board *The Steinturm* made the following order :—

"The Marshal be authorised for the purpose of the warehousing of the cargo, to put the cargo in the hands of the Crown, the Attorney-General undertaking on behalf of the Crown that in the event of the cargo or any part of it being for this purpose removed out of the jurisdiction of the Court, it shall be brought back within the jurisdiction upon the order of the Court."

Towards the end of September, 1914, the vendors wrote to the purchasers, enclosing copies of three invoices in connection with the July shipment and asked them to keep themselves in readiness to pay for the goods in cash against shipping documents on arrival of the steamer as they, the vendors, were not responsible for any shortage. On the 2nd October, 1914, the purchasers replied stating that they found a mistake had been committed in the invoice as regards the weight and called upon the vendors to correct the invoice. The vendors on the same day wrote to say they were not liable to make any corrections.

On the 19th November, 1914, the President of the Prize Court made the following order that, inasmuch as the steamer contained general cargo sent to Madras, Calcutta and Chittagong,

"In the event of the Crown in the exercise of its powers under the said order of the Court conveying the said cargo to Madras and Calcutta, respectively, the Crown be authorised to recover against all cargo released and delivered at Madras and Calcutta the following expenses, that is to say—

(*a*) in respect of freight Rs. 15·5 per ton weight or measure ;

(*b*) in respect of agency charges, such reasonable expenses as may be incurred."

He further ordered that,

"the steamer should not depart from Colombo until the expiration of a period of 21 days from the date of this order.

A statement of the substance of this order be prepared by the Registrar

1917

MADHORAM HURDEO DAS v. G. C. SETT.

and supplied to the Attorney-General who will undertake the responsibility of securing its adequate advertisement in India."

Messrs. Graham & Co., Merchants of Calcutta, were employed as agents on behalf of the Crown to give delivery of the goods consigned to Calcutta to the consignees. They, thereupon, communicated with the vendors in respect of their goods which had been shipped by the s.s. *Steinturm*. The s.s. *Steinturm* arrived in Calcutta on the 2nd January, 1915, and the vendors immediately wrote informing the purchasers and requested them to take delivery of the said goods as early as possible. Two days later the vendors wrote to the purchasers asking for payment and giving them notice of the resale of the goods on purchasers' account if the payment was not made immediately on receipt of this letter. On the same day the purchasers replied through their attorneys that they were prepared to pay for and take delivery of the goods with the exception of 22 pieces of basic steel bars mentioned in the invoice, owing to an over-statement in their weight, on the bill of lading for the same being made over to them, and that if the vendors failed to do so they, the purchasers, would not be liable for any wharf rent, if incurred. On the 8th January, 1915, the purchasers' attorneys wrote to the vendors offering to pay the full price of the July shipment on receiving the bills of lading and other documents relating to the goods and also to pay the necessary charges for obtaining delivery of the goods from the jetties. This was followed by another letter from them on the 19th January, 1915, tendering Rs. 4,370, being the price of the July shipment, including the usual charges and calling upon the vendors to hand over to the purchasers the bills of lading and other documents relating to the said goods to enable them to obtain delivery. In this letter it was further stated that on the vendors

failing to do so, the purchasers would hold them liable for all losses, damages, costs and charges which the purchasers might suffer or would be put to by reason of the default. In the meantime the goods had been delivered by Messrs. Graham & Co. to the vendors and on the 27th January, 1915, the vendors' attorneys wrote to the purchasers' attorneys as follows:—"As arranged my clients are now ready to deliver the goods demanded by you on receipt of the price, godown rent and charges." In reply to this the purchasers' attorneys wrote on the 4th February, 1915, denying the arrangement, but stating that the purchasers were still ready and willing to pay the price of the goods and the duty, landing and proper charges in respect thereof, as was usual in the case of deliveries *ex* jetty. On the same day the vendors' attorneys gave notice to the purchasers' attorneys that if the goods were not taken delivery of by their clients within three days, the vendors would resell the goods on purchasers' account and risk. On the 9th February, 1915, the vendors' attorneys again wrote to them stating that the price and charges to be paid were mentioned in the bill sent to the purchasers and that in addition to this the purchasers would have to pay godown rent and cartage, etc. The notice of resale within three days was also repeated in this letter. On the 12th February, 1915, the purchasers wrote denying any bills had been submitted to them for payment and refusing to pay godown rent and other incidental charges. On the 23rd February, 1915, the vendors sent the purchasers their bill for the goods *ex* s.s. *Steinturm* and on the 8th March, 1915, the purchasers' attorneys wrote to the vendors' attorneys asking for a statement of the charges the vendors claimed in respect of the said goods and stating that if these charges were reasonable and proper the

1917

MADHORAM HURDFO DAS v. G. C. SETT.

purchasers would take delivery of the goods. In reply to this, on the 10th March, 1915, the vendors' attorneys wrote that their clients had sold the goods to a third person. The purchasers, thereupon, instituted a suit against the vendors on the 18th March, 1915. On the suit having been decreed by Mr. Justice Chaudhuri, the defendants appealed.

Mr. C. C. Ghose (with him *Mr. B. C. Mitter* and *Mr. K. P. Khaitan*), for the appellants. The contract in suit was a c. i. f. contract. On the outbreak of war between England and Germany and the seizure of the vessel and her detention with her cargo by the Government at Colombo the contract of affreightment between the appellants and the German shipowners came to an end and the appellants could not insist on the voyage being continued by the latter to the Port of Calcutta. The contract of affreightment having ceased to exist, the contract in suit must be held to have become void under s. 56 of the Contract Act.

Arnhold Karberg & Co. v. *Blythe, Green, Jourdain & Co.*, *Theodor Schneider & Co.* v. *Burgett & Newsam* (1) was relied on. The incidents of an ordinary c. i. f. contract as set out in *Biddell Brothers* v. *E. Clemens Horst Company* (2) were modified in the present case where the goods were to be delivered to the respondents at the port of destination, and the payment of the same was to be made not against documents, but against goods 48 days after they had been landed. *Arnhold Karberg & Co.* v. *Blythe, Green, Jourdain & Co.*, *Theodor Schneider & Co.* v. *Burgett & Newsam* (3) dealt specifically with the point that the documents ought to have been tendered to the vendee immediately on their arrival. In the present case there

(1) [1915] 2 K. B. 379; [1916] 1 K. B. 495.
(2) [1911] 1 K. B. 214.
(3) [1916] 1 K. B. 495.

was no obligation on the appellants to tender to the respondents the documents in respect of the goods in contract. Moreover, the documents had become ineffective on account of the contract having become void. This was not a temporary embargo, but a hostile seizure. *Boedes Lust* (1) was referred to. The subsequent delivery of the goods to the appellants by the Prize Court freed them from all the incidents of the contract in suit. Assuming that the contract did not come to an end and was subsisting on the date the goods arrived in Calcutta and that the respondents were entitled to demand the delivery of the goods on payment of the contract price, the respondent must bear the extra charges to Government: see *The Corsican Prince* (2) in support of this contention. In *Acme Wood Flooring Co., Ld.* v. *Sutherland Innes Co., Ld.* (3) the extra charges fell on the vendor on account of the insertion of the "London Clause" in the contract. Had this special clause not existed, the purchaser would have had to pay it. Moreover, under the provisions of sections 67 and 70 of the Contract Act the appellants who could only get delivery of the goods under the contract by payment of the extra charges were entitled to be reimbursed by the respondents. The word "free" in the contract did not mean that in extraordinary circumstances if any extra charges had to be paid for the goods, such charges would fall on the appellants. On the delivery of the goods to the carriers the property in the goods passed to the purchasers. The risk having thus passed to the respondents, they were clearly bound to pay the appellants the extra charges. Lastly, the correspondence between the parties after the date when the contract came to an end could not be treated as

(1) (1804) 5 Rob. Admir. 233. (2) [1916] P. 195.
(3) (1904) 9 Com. Cas. 170.

1917

MADHORAM HURDEO DAS v. G. C. SETT.

anything but a new offer which the respondents did not accept.

Mr. S. R. Das (with him *Mr. B. L. Mitter*), for the respondents. There was no doubt that the contract was an ordinary c. i. f. contract with certain differences. Although the appellants' case was that they had intended as early as the 2nd July, 1914, to appropriate these goods to the contract in suit, it was necessary for the respondents to have assented to the appropriation. As a matter of fact the respondents did not assent to the appropriation till after war was declared and the goods had been released by the Prize Court at Colombo and the respondents had received intimation of it. Furthermore, the bill of lading was in the name of the vendors and the goods under it would not have become the property of the respondents until they had been delivered over to them. The law in India on assent being given to the appropriation and ascertainment of goods under the contract was contained in s. 83 of the Contract Act. See Pollock & Mulla's Contract Act, 3rd Edn., p. 377. See also *Mirabita* v. *The Imperial Ottoman Bank* (1). There was no agreement that the goods were to be of German manufacture or to be brought out in a German vessel. The outbreak of war, therefore, did not affect the respondents' contract. The first intimation the respondents had about the goods was when the Prize Court decided that the s.s. *Steinturm* was condemned and the cargo released. The declaration of war would have put an end to the contract in suit only in the case where prior to such declaration these goods had been appropriated to the respondents and the appropriation assented to by them. The appellants were not entitled to say after the 2nd January, 1915, when the goods arrived in Calcutta, that these goods were not

(1) (1878) L. R. 3 Ex. D. 164.

the property of the respondents on the ground that the contract in suit had come to an end on the declaration of war, making the bill of lading an ineffective document. Had these goods not arrived in Calcutta, it might have been different. The subsequent correspondence between the parties, the offer of the goods on the 2nd January, 1915, by the appellants to the respondents, their appropriation of the same to the respondents and the assent of the respondents to this appropriation, all shut the appellants out from their defence. There was, therefore, nothing to prevent the goods being delivered to the respondents on the 2nd January, 1915. As regards the illegality of the documents, this must always be considered at the time of their tender, *In re Weis & Co., Limited and Crédit Colonial et Commercial (Antwerp)* (1) was referred to. Under this contract the respondents were not entitled to recover from the appellants the extra charges on the goods payable to Government, especially as the bill of lading was in the name of the appellants and had not been made over by them to the respondents, when the latter had asked for them.

Mr. C. C. Ghose, in reply. The only questions were what were the liabilities under the contract of the 2nd February, 1914, which the appellants had undertaken to perform, and were the appellants prevented from carrying out the contract. On the declaration of war the contract in suit became void and the goods arrived in Calcutta completely freed from the incidents of that contract? The original bill of lading as evidence of title to the goods and as evidence of contract of affreightment to carry goods, had entirely perished, because the contract had ceased to exist in respect of an integral part of a c. i. f. contract and in law the goods had undergone a total

(1) [1916] 1 K. B. 346,

1917

MADHORAM HURDEO DAS v. G. C. SETT.

transformation after the 4th August, 1914. This document was serviceable only for the purpose of identifying the goods that were shipped from Antwerp. Conditions had been imposed on the goods in Colombo by the Prize Court and from Colombo the voyage had to be performed by a different person, viz., the Crown. *Ireland* v. *Livingston* (1) was referred to.

Cur. adv. vult.

SANDERSON C.J. This is an appeal by the defendants Madhoram Hurdeo Das against the decision of Chaudhuri J., whereby he gave judgment for the plaintiffs for Rs. 2,500 as damages for breach of contract and costs.

The contract was contained in a letter written by the defendants to the plaintiffs and dated 2nd February, 1914, as follows :—

"Calcutta, 2nd February, 1914.

"Messrs. G. C. Sett and R. B. Sett,
Calcutta.

"Dear Sirs,

We beg to enter as having sold you through broker P. N. Mukherjee 150 tons basic steel bars with usual 10 per cent. 2nd class extras at £ 5-7-6 per ton c. i. f., *i.e.*, free Hooghly. Shipment in three monthly lots commencing June, *i.e.*, June, July, August, 1914. Delivery to be completed within three days from the date of the landing of the goods. Terms 45 days' credit from the date of the delivery of the goods failing which due date will be calculated from the due date of the delivery, *i.e.*, three days from the landing of the goods.

This sale is made on the basis of the existing terms and conditions in the contract for this class of goods as are current in the market. Interest at the rate of 8 per cent. per annum to be charged on any money unpaid after the due date and rebate for payments before the due date will be allowed at the same rates. You have the option to have the goods weighed so as to arrive at the actual weighment and in that case you shall have to notify us, so that we may make necessary arrangements to have our man present. But in any case, claim for weighment will not be entertained, if made after three days after the arrival of the goods in your godowns from

(1) (1871) L. R. 5 E. & I. App. 395.

the jetty, and the invoice weight shall be accepted by you as the correct one. Please confirm.

Yours faithfully,

Madhoram Hurdeo Das."

The July consignment was shipped by the Belgo-Asiatic Trading Company, from whom the defendants had bought the goods, on the 2nd July, 1914, at Antwerp on board the s.s. *Steinturm* which was a German vessel. Some of the goods were made in Belgium, others were made in Germany as appears from the invoices in respect of the goods. Neither the bill of lading nor the Policy of Insurance was produced in Court, but it was assumed for the purpose of the appeal by both sides that the bill of lading was made out in the name of the defendants and that the contingency which happened, viz., the capture and condemnation of the ship and the consequent expenses were not covered by the Policy of Insurance.

At the time of the declaration of War against Germany, namely, on the 4th August, 1914, *The Steinturm* was at sea, and at some time subsequently, which has not been proved, she was captured by a British ship and taken to Columbo. The *Steinturm* was condemned by the Prize Court, but the cargo in question was released and inasmuch as the ship was carrying a general cargo consigned to Madras, Calcutta and Chittagong, it was ordered on the 19th November, 1914, by the Prize Court that in the event of the Crown in the exercise of its powers under a previous order dated 2nd September, 1914, consigning the said cargo to Madras and Calcutta—the Crown be authorised to recover against all cargo released and delivered at Madras and Calcutta in respect of freight Rs. 15-5 per ton and in respect of agency charges such reasonable expenses as might be incurred.

Consequently the consignment in question was

1917

MADHORAM HURDEO DAS v. G. C SETT.

SANDERSON C. J.

carried in *The Steinturm* under the above mentioned order and arrangement to Calcutta and arrived there on or about the 2nd January, 1915, the freight for the carriage from Colombo to Calcutta was Rs. 818-14, as is shown from the bill dated the 23rd February, 1915; in addition there were Rs. 82 for charges in respect of release from the Prize Court and other expenses in consequence of the capture of *The Steinturm* and the conveyance of the cargo from Colombo to Calcutta.

The course of events may be taken from the learned Judge's summary of what he describes as the undisputed facts of the case, as follows :—

"That the plaintiffs failed to pay the price of the June shipment and a suit had to be instituted against them which was decreed on the 26th January, 1915; that copies of three invoices were sent to the plaintiffs by the defendant firm of the goods per s.s. *Steinturm*. In or about the end of September, 1914, the defendant firm asked the plaintiffs to keep themselves in readiness to pay for the goods in cash against shipping documents on arrival of the steamer. See their letter dated $\frac{24th}{30th}$ September, 1914. Apparently there was a mistake in the invoices as regards the weight, and the plaintiffs called upon the defendants to correct it, but the defendants stated that they were not liable to make any corrections. On the 2nd January, 1915, the defendant firm intimated to the plaintiffs that the vessel had arrived in port and requested them to take delivery of the goods by paying for them as early as possible. The cause of late arrival was the seizure of the steamer at Colombo.

By an order dated 24th August, 1914, on the application of the Crown, the steamer was handed over by the Colombo Prize Court to the custody of the Principal Collector of Customs, and the following

1917

MADHORAM HURDRO DAS v. G. C. SETT.

SANDERSON C. J.

undertaking and decree was entered of record, namely, 'the Solicitor-General on behalf of the Crown undertakes that the Crown will restore the ship to its present place, whenever it is called upon to do so by this Court, if the Government of Ceylon on behalf of the Crown are allowed to take charge of the ship, and moves that the Crown be allowed to take charge of the ship, on these terms. It is ordered and decreed that the application be allowed and that the Marshal be directed to let the Government of Ceylon have possession of the ship, after the cargo, goods, wares and merchandise have been warehoused. It is further directed that the Marshal shall require from any person taking over the ship on behalf of the Government an authority to do so, signed by His Excellency the Governor or by the Colonial Secretary.' The President of the Prize Court appears to have made an order on the 19th November, 1914, that inasmuch as the steamer contained general cargo sent to Madras, Calcutta and Chittagong, it was for the interest of all persons concerned that the cargo entitled to release, which was consigned to Calcutta, should be delivered at Calcutta, it was further ordered that 'in the event of the Crown in the exercise of its power conveying the said cargo to Calcutta the Crown was authorised to recover against all cargo released and delivered, certain expenses, namely—

'In respect of freight Rs. 15-5 per ton, weight or measure.

'In respect of agency charges, such reasonable expenses as may be incurred.'

'And that the steamer was not to depart from Colombo until after the expiration of three weeks from the date of that order.' On the 2nd September 1914, the Prize Court on hearing the Attorney-General made the following order, 'that the Marshal be authorised

1917

MADHORAM HURDEO DAS v. G. C. SETT.

SANDERSON C. J.

for the purpose of warehousing the cargo to put the cargo in the hands of the Crown, the Attorney-General undertaking on behalf of the Crown that in the event of the cargo or any part of it being removed out of the jurisdiction of this Court, it was to be brought back within the jurisdiction upon the order of the Court.' What happened, was, that Messrs. Graham & Co., Merchants of Calcutta, were employed as Agents on behalf of the Crown to give delivery of the goods consigned to Calcutta to the consignees. Graham & Co., thereupon, communicated with the defendant firm in respect of the July shipment of the goods which had come out in that steamer, and these goods arrived, as stated above, on the 2nd January. The defendant firm had to pay certain charges for freight and commission to Messrs. Graham & Co. for these goods. The defendants allege that by the said letter dated 23rd February, 1915, they gave particulars of the cost and charges iucurred by them in respect of the consignment including therein the charges occasioned by the seizure and release. That prior to that date and after the arrival of the goods in Calcutta some correspondence ensued. The defendant firm wrote to the plaintiffs on the 4th January, 1915, that unless the plaintiff firm immediately sent the price of the goods of the June shipment, which had already been delivered to them, as also the price of the goods per S.S. *Steinturm* they would be compelled to resell the goods on the plaintiffs' account. The plaintiffs wrote on the same date that they were prepared to pay for and take delivery of all the goods with the exception of 22 pieces of basic steel bars, the weight of which had been incorrectly stated in the invoice. They said that if they (defendants) failed to make over the bill of lading for the goods they would not be liable for any wharf rent, if incurred. On the 8th

January, the plaintiffs said that they were prepared to pay the full price of the three lots which had come per S.S. *Steinturm* on the defendant firm handing over to them the bills of lading and other documents. They offered to pay the necessary charges for obtaining delivery of the goods from the jetties, and asked for information as to the exact amount payable by them. There was no reply to this letter. On the 19th January, they offered Rs. 4,370 as being the price of the goods including the usual charges. On the 27th January, Charu Chandra Bose, attorney for the defendants, wrote to the plaintiffs' attorneys the following letter:—'As arranged my clients are now ready to deliver the goods demanded by you on receipt of the price, godown rent and charges.' It will be noticed this letter was written the day after the decree above referred to. It was a consent decree and the defendants say that terms arranged between the parties were that the goods of the July shipment would be taken delivery of by the plaintiffs after payment of all dues, that Nepal Chander on behalf of the plaintiffs agreed to pay all costs in respect of the July shipment, freight, etc., that is to say, the extra freight and other charges incurred in respect of the consignment. This arrangement is entirely denied by the plaintiffs. No reply was sent by the plaintiffs to that letter until the 4th February, 1915, when they said that nothing had been arranged as suggested by the defendants. They said that the defendants were not entitled to godown rent, and refused to pay the same. They complained that the defendants had not specified what charges they were claiming, and expressed their readiness and willingness to pay the price of the goods and the duty, landing and proper charges in respect thereof, as were usual in the case of delivery *ex* jetty. On the 4th February, the defendants' attorney said that if the

1917

MADHORAM HURDEO DAS v. G. C. SETT.

SANDERSON C. J.

goods were not taken delivery of within three days, the defendants would resell on the plaintiffs' account. Apparently these two letters crossed each other. On the 9th February, the defendant firm said that the price and charges to be paid were mentioned in their bills sent to the plaintiffs. Over and above that, the plaintiffs would have to pay godown rent and cartage for the removal of the goods, and unless the plaintiffs took delivery of the goods within three days, the defendants would resell the goods on the plaintiffs' account and risk. On the 12th February, the plaintiffs denied that any bills had been submitted to them for payment and refused to pay godown rent and other incidental charges. Nothing further was done by the plaintiffs until the 8th March, when their attorneys wrote a letter to the defendants' attorney asking for a statement of the charges the defendants claimed in respect of the said goods and if they found the same reasonable and proper, they would ask the plaintiffs to take delivery. On the 10th March, they were informed that the defendants had sold the goods to a third person."

The action was brought for breach of contract caused by the failure of the defendants to make over the bill of lading or to deliver the goods and the main point which was argued in this appeal was not taken by the defendants until the trial, when the learned Judge allowed the defendants to amend their defence as follows:—

"With further reference to paragraph 3 of the plaint herein the defendant firm state that the goods forming the July shipment referred to in the said paragraph were shipped from Antwerp on or about the 2nd day of July, 1914, per s.s. *Steinturm*. On the outbreak of War between His Britannic Majesty's Government and the German Empire on the 4th day of August, 1914,

the said steamer, which was on the high seas, became liable to seizure by the Naval forces of His Majesty's Government and as a matter of fact the said steamer was captured, seized and detained by His Majesty's Government at or near Colombo and was subsequently condemned with all the cargo on board by the Colombo Prize Court. The defendant firm submit that on such condemnation of the said steamer and of the cargo therein including the said goods, the contract with the plaintiffs became impossible of performance."

It is clear from the order of the Prize Court that though the ship was condemned the cargo in question was not condemned. It was, however, argued that although the cargo was eventually released the outbreak of war rendered the performance of the contract of 2nd February, 1914, impossible or at all events it rendered the contract of affreightment which was an implied part of the contract unlawful and consequently by reason of the provisions of section 56 of the Indian Contract Act, 1872, the contract was void.

This defence necessitates an examination of the terms of the contract.

After some discussion during the argument, it appeared that there was little, if any, material difference between the interpretations placed upon the contract by the learned counsel appearing for the plaintiffs and defendants; and both argued the case on the assumption that the contract was an ordinary c. i. f. contract with this variation that the payment specified in the contract was not to be made as usual against the documents and was not to be made in this case until 48 days after the landing of the goods. That having regard to the special terms of this contract it was not the duty of the defendants to hand over the documents relating to the goods as soon as

1917

MADHORAM HURDEO DAS v. G. C. SETT.

SANDERSON C. J.

the documents arrived, but that they were entitled to retain them until the goods arrived when it would be the duty of the defendants to hand over the documents to the plaintiffs for the purpose of taking delivery or for the defendants to take delivery themselves in the first instance and that payment would become due 48 days after the landing of the goods.

The question, therefore, arises what were the incidents of the defendants' undertaking in such a contract. The variation of the terms as to the time of payment does not, in my judgment, alter the nature of the contract as c. i. f. contract.

Taking the well-known incidents of such a contract, the defendants had, *firstly*, to ship at the port of shipment goods of the description contained in the contract; *secondly*, to procure a contract of affreightment under which the goods would be delivered in the Hooghly; *thirdly*, to arrange for an insurance upon the terms current in the trade which would be available for the benefit of the buyers; *fourthly*, to make out an invoice; and, *finally*, to tender these documents and by reason of the special terms of this contract, to tender such documents upon the arrival of the goods.

It may be assumed for the purpose of this case that the goods were of the description contained in the contract and that a contract of affreightment was procured under which in ordinary circumstances the goods would have been delivered in the Hooghly and that a sufficient insurance was arranged.

But it was argued on behalf of the defendants that although the goods eventually arrived and were capable of physical delivery in the Hooghly, they did not so arrive under the contract of affreightment procured by them in pursuance of their contract of 2nd February, 1914, with the plaintiffs. That the original

contract of affreightment of which the bill of lading was evidence came to an end as soon as war broke out, that though the goods were in fact carried by *The Steinturm* to the Hooghly, they were carried by her, after she had been condemned by the Prize Court in Ceylon and under an arrangement made in pursuance of an order of that Court, by which further freight and expenses became charged upon the cargo, and that, inasmuch as the defendants could not deliver the goods under the original contract of affreightment, the performance of their contract was impossible.

In my judgment this contention should be adopted. It was an implied part of the contract of 2nd February, 1914, that the defendants should procure a contract of affreightment, under which the goods would be delivered in the Hooghly. That contract of affreightment was procured and it was represented by the bill of lading in the name of the defendants.

But the operation of war on such a contract of affreightment made before, but which remained unexecuted, at the time the war was declared made the further execution so far as the defendants, British subjects, were concerned, unlawful, it being a contract with an alien enemy, and the contract of affreightment thereby become dissolved: *Esposito* v. *Bowden* (1).

Further, the capture of S.S. *Steinturm* prevented the delivery of the goods, under the contract of affreightment procured by the defendants in pursuance of their contract with the plaintiffs, and the goods could only be delivered in the Hooghly by the payment of further freight and expenses which by the order of the Prize Court in Ceylon had become charged on the goods.

The bill of lading which under a c.i.f. contract

(1) (1857) 7 E. & B. 763.

1917

MADHORAM HURDEO DAS v. G. C. SETT.

SANDERSON C. J.

is tendered by the seller to the buyer would be such as would procure delivery of the goods from the ship. In this case the bill of lading, if tendered by the defendants, would not by itself have enabled the plaintiffs to obtain delivery of the goods from the ship. Something more would have been necessary to enable the plaintiffs to get delivery, *viz.*, the authority of the agents of the Crown which authority could only be obtained by the payment of the freight from Colombo to the Hooghly and certain other charges.

For these reasons it appears to me that the contract between the plaintiffs and the defendants included the performance of an act (*viz.*, the procuring the contract of affreightment under which the goods would be delivered in the Hooghly) which after the contract was made became impossible by reason of the outbreak of war, within the meaning of section 56 of the Indian Contract Act and consequently the contract of 2nd February, 1914, was void.

I think also that the procuring of the further execution of the contract of affreightment which was an implied part of the contract of 2nd February, 1914, became unlawful by reason of an event which the defendants could not prevent, *viz.*, the outbreak of war and consequently the contract of 2nd February, 1914 became void by reason of the provisions of section 56.

The learned counsel for the plaintiffs pressed us with the argument that the property in the goods had not passed to the plaintiffs, by reason of the fact that no appropriation of these goods, to which the plaintiffs assented, to the contract in question had taken place until August or September, 1914, *i.e.*, after the capture and condemnation of the S.S. *Steinturm* and that the plaintiffs' contract, therefore, was not affected by the fact that the goods had been carried in a German vessel at the outbreak of the war.

I do not think it necessary to express any opinion on this point, for in my judgment it is immaterial to the question whether the performance of an integral part of the contract between the plaintiffs and the defendants was rendered impossible or unlawful by the outbreak of the war.

It was further argued that the contract of affreightment did not relate to the goods the subject-matter of the contract of 2nd February, 1914. This point, as far as I understand, was not raised at the trial, and I think there can be no doubt that the contract of affreightment did, in fact, relate to the goods, the subject of the contract.

But then it was said, even if that be so in point of fact, it cannot be said in law that the contract of affreightment was in pursuance of the contract between the plaintiffs and the defendants until something is done which binds the plaintiffs, such as assent by the plaintiffs.

Having regard to what I consider is the material question in this case, as intimated already, I cannot agree to the last proposition. I think the assent of the plaintiffs was immaterial and it was merely a question of fact whether the contract of affreightment did really relate to the subject-matter of the contract of 2nd February, 1914, and having regard to the date of the invoice, the description and quantities of the goods contained therein, there can be no doubt that in point of fact the contract of affreightment related to the subject-matter of the contract of 2nd February, 1914.

As already stated the defendants did not take up the position now relied upon until the trial of the action and the defendants on the 2nd January, 1915, had called on the plaintiffs to take delivery. It was contended that the defendants by reason of such

1917

MADHORAM HURDEO DAS v. G. C. SETT.

SANDERSON C. J.

action were estopped from relying on the above-mentioned defence.

The plaintiffs were not able to point to any respect in which they had altered their position by reason of the alleged representation of the defendants that they were in a position to give delivery in accordance with the contract, and I do not think that the defendants are estopped from taking the defence upon which they now rely. That defence, for the reasons given above, is in my judgment a good one, and, therefore, this appeal should be allowed, and judgment entered for the defendants with costs in this Court and in the Court of first instance.

Any extra costs necessitated by the amendment of the defence, or costs thrown away by reason thereof to be paid by the defendants to the plaintiffs.

Money in Court to be paid out to the defendants.

MOOKERJEE J. This is an appeal by the defendants in a suit for damages for breach of contract. On the 2nd February, 1914, the defendants agreed to sell to the plaintiff 150 tons basic steel bars to be shipped in June, July and August, 1914, in equal proportions. The terms of the contract were set out as follows in a letter addressed by the defendants to the plaintiffs :

"We beg to enter as having sold you through broker, P. N. Mookerjee, 150 tons of basic steel bars with usual 10 per cent. second class extras at £ 5-7-6 per ton, c. i. f., *i.e.*, free Hooghly. Shipment in three monthly lots, commencing June, *i.e.*, June, July, August, 1914. Delivery to be completed within three days from the date of the landing of the goods. Terms 45 days' credit from the date of the delivery of the goods failing which, due date will be calculated from the due date of the delivery, *i.e.*, three days from the landing of the goods. This sale is made on the basis of the existing terms and conditions in the contract for this class of goods as are current in the market. Interest at the rate of 8 per cent. per annum to be charged on any money unpaid after the due date and rebate for payments before the due date will be allowed at the same rate. You have the option to have the goods weighed so as to arrive at the actual weighment, and in

that case you shall have to notify us, so that we may make necessary arrangements to have our man present. But, in any case, claim for weighment will not be entertained if made after three days after the arrival of the goods in your godowns from the jetty and the invoice weight shall be accepted by you as the correct one. Please confirm."

On the 14th February, 1914, the plaintiffs supplied the specifications, and on the 19th February the defendants sent out an order to the Belgo-Asiatic Trading Company of Brussels for supply of the goods, which were partly of Belgium and partly of German manufacture. The June shipment was received by the defendants in due course and was delivered to the plaintiffs. We are now concerned with the July shipment. The goods were shipped from Antwerp on the 2nd July, 1914, in s.s. *Steinturm*, a German steamer, which was on the high seas when war broke out between England and Germany on the 4th August, 1914. The ship was captured by the Naval Forces of His Majesty as an enemy ship, and was brought before the Ceylon Court of Admiralty. On the 25th August, 1914, the ship was condemned as lawful prize, but the cargo was released. On the 19th November, 1914, the Prize Court ordered that, in the event of the Crown conveying the cargo to destination, the Crown be authorised to recover against all cargo released and delivered at Calcutta, the following expenses, namely, Rs. 15-5-0 in respect of freight per ton weight or measure and such reasonable expenses as may be incurred in respect of agency charges. The Government of Ceylon took possession of the cargo on behalf of the Crown, and Graham & Co. were employed to act as their Agents. The goods arrived in Calcutta on the 2nd January, 1915, and the defendants took delivery on payment of freight and agency charges to Graham & Co. Meanwhile, the defendants had, on the 30th September, 1914, intimated to the plaintiffs that they

1917

MADHORAM HURDEO DAS v. G. C. SETT.

MOOKERJEE J.

had received invoices for the goods (copies whereof were enclosed); no mention, however, was made of seizure of the ship; indeed, there is nothing to show that either party was, at that date, aware of what had happened. On arrival of the goods in Calcutta, there was some controversy between the parties as to whether the plaintiffs or the defendants were liable to bear the charges imposed by the Prize Court. The plaintiffs denied their liability in this respect, with the result that the defendants disposed of the goods in the market. On the 18th March, 1915, the plaintiff instituted the present action for recovery of Rs. 3,563-1-6 as damages for failure of the defendants to deliver the goods in terms of the contract. The defendants resisted the claim substantially on the ground that the contract became void when war broke out on the 4th August, 1914.

Mr. Justice Chaudhuri has overruled this contention and has given the plaintiffs a decree for damages which he has assessed at Rs. 2,500. On the present appeal, the defendants have reiterated the ground which they urged unsuccessfully in the Court below to enable them to escape from liability under the contract. The solution of the question raised clearly depends upon the nature of the contract and the effect thereon of well established legal principles.

The agreement between the parties constitutes what is known as c. i. f. or c. f. i. (costs, freight and insurance) contract, subject to an important variation. The rights and liabilities of the parties to a c. i. f. contract were formulated by Hamilton J. in *Biddell Brothers* v. *E. Clemens Horst Co.* (1), in the following terms which were approved by Kennedy L. J. in his celebrated dissentient judgment in the Court of Appeal *Biddell Brothers* v. *E. Clemens Horst Co.* (2) which

(1) [1911] 1 K. B. 214. (2) [1911] 1 K. B. 934, 954.

was upheld by the House of Lords and characterised by Lord Loreburn L. C. as a remarkable judgment illuminating the whole field of controversy: *E. Clemens Horst Co.* v. *Biddell Brothers* (1). "A seller under a contract of sale containing such terms has, *firstly*, to ship at the port of shipment goods of the description contained in the contract; *secondly*, to procure a contract of affreightment under which the goods will be delivered at the destination contemplated by the contract; *thirdly*, to arrange for an insurance upon the terms current in the trade which will be available for the benefit of the buyer; *fourthly*, to make out an invoice as described by Blackburn J. in *Ireland* v. *Livingston* (2), or in some similar form; and, *finally*, to tender these documents to the buyer, so that he may know what freight he has to pay and obtain delivery of the goods, if they arrive, or recover for their loss if they are lost on the voyage. Such terms constitute an agreement that the delivery of the goods, provided they are in conformity with the contract, shall be delivery on board ship at the port of shipment. It follows that, against tender of these documents, the Bill of Lading, Invoice and Policy of Insurance which completes delivery in accordance with that agreement, the buyer must be ready and willing to pay the prices." [*See* also, *Houlder Brothers* v. *Public Works Commissioner* (3).] In the case before us, there was this departure from the normal incidents of a c. i. f. contract that the payment was to be made, not against the documents, but forty-eight days after the goods had been landed. It follows accordingly that the defendants were under no obligation to hand over the documents to the plaintiffs immediately on receipt thereof; they could tender the documents on arrival

(1) [1912] A. C. 18, 22. (2) (1871) L. R. 5 H. L. 395, 406.
(3) [1908] A. C. 276, 290.

1917

MADHORAM HURDEO DAS v. G. C. SETT.

MOOKERJEE J.

of the goods, or might take delivery themselves and make over the goods to the plaintiffs. The defendants argue that, in these circumstances, the contract became void on the 4th August, 1914, inasmuch as, on that date, one essential element thereof, namely, the contract of affreightment became unlawful by reason of the outbreak of the war and consequently void. This contention raises the question of the effect of the outbreak of war on an executory contract made with an alien enemy before the war. Such a contract is avoided or dissolved by the outbreak of war, if it enures to the aid of the enemy [*Furtado* v. *Rodgers* (1)], or if it is in its nature incapable of suspension [*Griswold* v. *Waddington* (2)]. A contract is deemed in its nature incapable of suspension if its proper performance necessitates intercourse with the enemy during the war: [*Esposito* v. *Bowden* (3) and *The William Bagaley* (4)] or where time is of the essence of the contract, or the parties cannot, on conclusion of peace, be made equal *New York Life Insurance Co.* v. *Statham* (5) and *Janson* v. *Driefontein Consolidated Mines, Limited* (6). The principle which underlies this doctrine is best stated in the words of Lord Tenterden quoted by Willes J. in *Esposito* v. *Bowden* (3). "Another general rule of law furnishes a dissolution of these contracts (*i.e.*, for carriage of goods in merchant ships) by matter extrinsic. If an agreement be made to do an act lawful at the time of such agreement, but afterwards and before the performance of the act the performance be rendered unlawful by the Government of the country, the agreement is absolutely dissolved. If,

(1) (1802) 3 Bos. & Pul. 191; 6 R. R. 752.
(2) (1818) 15 Johnson 57; 16 Johnson 438.
(3) (1857) 7 E. & B. 763; 110 R. R. 822.
(4) (1860) 5 Wallace 397, 407.
(5) (1876) 93 U. S. 24.
(6) [1902] A. C. 484.

therefore, before the commencement of a voyage, war or hostilities should take place between the State to which the ship or cargo belongs and that to which they are destined, or commerce between them be wholly prohibited, the contract for conveyance is at an end, the merchant must unload his goods, and the owners find another employment for their ship; and probably the same principles would apply to the same events happening after the commencement and before the completion of the voyage". Chancellor Kent adopts the same conclusion for the reason that war making performance unlawful or impossible either before or after its commencement dissolves the contract of affreightment. "The contract of affreightment may be dissolved without execution, not only by the act of the parties, but, in many cases, by the act of the law. If the voyage becomes unlawful or impossible to be performed, or if it be broken up, either before or after it has actually commenced, by war or interdiction of commerce with the place of destination, the contract is dissolved. There is no difference in principle between a complete interdiction of commerce which prevents the entry of the vessel, or a partial one, in relation to the merchandise on board, which prevents it being landed. The contract of affreightment in respect to the goods is dissolved, for the shipper cannot demand the delivery of the goods if the landing of them would expose the vessel to seizure. And if the voyage be broken up by capture on the passage, so as to cause a complete defeasance of the undertaking, the contract is dissolved, notwithstanding a subsequent recapture". (Commentaries, Vol. III, page 248; see also Vol. I, page 66. The contrary rule seems to have been formulated in the French Code de Commerce, sections 276, 277.)

1917

MADHORAM HURDEO DAS v. G. C. SETT.

MOOKERJEE J.

This was recognised in *Avery* v. *Bowden* (1) which shows that a contract of affreightment may at once become void by the declaration of war. [*See* note to *Clemonston* v. *Blessig* (2)].

The doctrine that a contract entered into before war is dissolved by the outbreak of war, when its performance would involve "trading with the enemy," has been recognised in the recent cases of *Duncan, Fox & Co.* v. *Schrempft & Bonke* (3), *Arnhold Karberg & Co.* v. *Blythe, Green, Jourdain & Co.* (4), *The Parchim* (5) and an instructive application is furnished by the decision in *Nissim Isaac Bekhor* v. *Haji Sultanali Shastary* (6), which further adopts the view taken in *C. Groom, Ld.* v. *Barber* (7), that the seller is not bound in a c. i. f. contract to provide the purchaser with a policy covering war risks. The decision *In re Weis & Co.* (8) is not in conflict with the principle already enunciated, and is clearly distinguishable on the ground that the goods had been captured by the enemy before tender of the documents. I see no escape from the position, in the case before us, that the contract of affreightment was dissolved on the date of the outbreak of the war as the sellers could not thereafter insist on its performance by an alien enemy. In this view, the conclusion is inevitable that the contract for supply of goods also became void on that date.

The plaintiffs contend, however, that no question of the complete execution of the contract of affreightment properly arises in this case, inasmuch as the

(1) (1855) 5 E. & B. 714; (1856) 6 E. & B. 953.
(2) (1855) 11 Exch. 135; 105 R. R. 451.
(3) [1915] 1 K. B. 365; [1915] 3 K. B. 355.
(4) [1915] 2 K. B. 379, 386; [1916] 1 K. B. 495.
(5) (1915) 1 Trehern P. C. 579.
(6) (1915) I. L. R. 40 Bom. 11.
(7) [1915] 1 K. B. 316.
(8) [1916] 1 K. B. 346.

goods were in fact ultimately brought to their destination by s.s. *Steinturm*. This argument is obviously fallacious. The substance of the matter is that the goods were not and could not be carried to the port of destination under the original contract of affreightment. This is manifest from the proceedings in the Prize Court. The ship and cargo were seized, and although the ship alone was condemned while the cargo was released, the release was conditional on the payment of freight and charges as determined by the Prize Court. That the cargo was properly released is clear from the decision in *Re Cargo S.S. Rappen fels* (1), as the property in the cargo had at the time of capture vested in the consignees, British subjects. [See the observations of Kennedy L. J. in *Biddell Bros.* v. *Clemens Horst Co.* (2)]. But it is clear that the Prize Court and the Prize Court alone had jurisdiction to determine the question of freight and the conditions whereon the cargo should be released: *The Corsican Prince* (3). As explained by Sir Samuel Evans, the Prize Court deals with such claims in accordance with the Law of Nations and upon equitable principles, freed from contract which almost always cease to have effect upon capture or seizure, by reason of the non-appearance or non-completion of the contract of affreightment; it may, indeed, discard the contract rate altogether even as a basis for assessment or calculation: *The Twilling Riget* (4). It is further indisputable that where the ship is condemned, but the goods released, the Crown is entitled to impose the payment of freight as a condition of their release, and has a lien on them till it is paid: *The Fortuna* (5), *The*

(1) (1914) I. L. R. 42 Calc. 334.
(2) [1911] 1 K. B. 934, 956.
(3) [1916] P. 195; (1915) 1 Trehern P. C. 178.
(4) (1804) 5 Rob. 82; 1 Eng. P. Cas. 430.
(5) (1802) 4 Rob. 278; 1 Eng. P. Cas. 392.

1917

MADHORAM HURDEO DAS v. G. C. SETT.

MOOKERJEE J.

Diana (1), *The Vrow Anna Catharina* (2), *The Vrow Henrica* (3), *The Roland* (4), and *The Parchim* (5). Consequently, the fact that the goods were brought to Calcutta ultimately by S.S. *Steinturm* is of no assistance to the plaintiffs; it was essentially a new voyage under new conditions; it was in no sense a continuation of the original voyage in fulfilment of the contract of affreightment; in the language of Chancellor Kent, that voyage was broken up by capture so as to cause a complete defeasance of the undertaking. The original bills of lading would be of no avail whatever, unless the consignee complied with the conditions imposed by the Prize Court. They would be useful for identification of the consignee in whose favour the Prize Court had decided to release the goods, but they had ceased to be operative legal documents, and delivery on their basis could not be claimed as a matter of right. I hold, accordingly, that the contract of affreightment and therewith the c. i. f. contract of sale became void on the 4th August 1914. Consequently, the rights and liabilities of the parties thereafter must be determined with reference to the second paragraph of section 56 of the Indian Contract Act. That paragraph, so far as it applies to the present case, provides that a contract to do an act, which, after the contract is made, becomes unlawful by reason of some event which the promisor could not prevent, becomes void when the act becomes unlawful. As pointed out in *Karl Ettlinger* v. *Chagandas* (6), this provision deals with a case where the act to be done was at the time the contract was made lawful, but a

(1) (1803) 5 Rob. 60; 1 Eng. P. Cas. 424.
(2) (1806) 6 Rob 269; 1 Eng. P. C. 552.
(3) (1803) 4 Rob. 343; 1 Eng. P. C. 399.
(4) (1915) 1 Trehern P. C. 188.
(5) (1915) 1 Trehern P. C. 579.
(6) (1915) I. L. R. 40 Bom. 301.

legal prohibition has supervened before the performance of the contract. In such a case, the contract becomes void, and no question of damages for breach thereof arises. The plain language of section 56 thus renders unnecessary a discussion of the refined distinctions observed in English law in cases of impossibility of performance, as illustrated by the recent decisions in *Horlock* v. *Beal* (1) and *F. A. Tamplin Steamship Co., Ld.* v. *Anglo-Mexican Petroleum Products Co., Ld.* (2).

From this standpoint, the correspondence between the parties as to the delivery of the goods is of no assistance to the plaintiffs. The defendants, no doubt, at one stage offered to deliver the goods to the plaintiffs on certain terms on the assumption that the contract was then in full operation. The proposed terms, however, were not accepted; there was thus no new agreement, nor did the principle of estoppel become applicable, as the plaintiffs are not shown to have altered their position in any manner by reliance on the conduct of the defendants. The claim of the plaintiffs is thus based on an alleged breach of an agreement which had become void long before the date when the breach is said to have taken place. In my opinion such a claim cannot be sustained.

On these grounds, I agree that this appeal must be allowed and the suit dismissed with costs.

O. M. *Appeal allowed: suit dismissed.*

Attorneys for the appellants: *Debi Prasad Khaitan.*

Attorneys for the respondents: *Fox & Mandal.*

(1) [1916] 1 A. C. 486. (2) [1916] 2 A. C. 397.

APPEAL FROM ORIGINAL CIVIL.

Before Sanderson C.J. and Mookerjee J.

1917

Feb. 11.

NANDALAL MULLICK

v.

PANCHANAN MUKERJEE.*

Review—Procedure and Practice—Discovery of new and important matter of evidence—Character of evidence—Trial of issue—Appeal against order granting review—Civil Procedure Code (Act V of 1908) O. XLIII, r. 1 (w); O. XLVII, rr. 1, 4, 7, 8.

The plaintiff obtained a decree in a suit instituted against the defendant. Subsequently, the defendant applied for a review of the decree on the ground of the discovery of new and important matter of evidence, which was not within his knowledge and could not be produced by him at the trial, and obtained a Rule calling upon the plaintiff to show cause why the said decree should not be reviewed and why this suit should not be set down on the peremptory list of suits for hearing. Upon the Rule coming on for hearing, the Court directed an issue to be tried as to the new and important matter discovered after the judgment in this case. This issue having come on for trial, the Court decided the issue in favour of the defendant and the Rule was made absolute.

Held, that this application for review was not granted in contravention to rule 4 of O. XLVII of the Civil Procedure Code, and it was not possible for the Court on this appeal to say that the learned Judge ought not to have made an order for review.

Held, also that the additional evidence was of such an unsatisfactory nature and it came into existence in such an unsatisfactory way and the learned Judge was apparently in such doubt as to whether it should be accepted, that it ought not to be taken as sufficient to overrule the distinct and clear opinion which he had formed.

Per SANDERSON C. J. It is most important that there should be some finality in the trial of cases, and the greatest care ought to be exercised in granting a review, when that review is asked for upon the allegation that fresh evidence has been discovered since the judgment was given.

In an ordinary case where the appeal is on a question of fact, where the

* Appeal from Original Civil No. 79 of 1916 in Suit No. 445 of 1915.

learned Judge of the Court of first instance has heard and seen the witnesses and has come to a conclusion upon the question of fact upon the evidence on the one side and on the other, there is a very great onus upon the shoulders of the appellant when he comes to this Court and asks it to overrule the decision of the learned Judge upon the question of fact.

Per MOOKERJEE J. Under O. XLVII, r. 7, an order granting an application for review may be attacked by way of appeal on the ground that the application has been granted on the ground of discovery of new evidence without strict proof of the applicant that such new evidence was not within his knowledge or could not be adduced by him when the decree was passed.

APPEAL by Nandalal Mullick, the plaintiff, from the judgment of Greaves J.

On the 15th April, 1915, Nandalal Mullick instituted a suit against one Panchanan Mukerjee for the sum of Rs. 2,282-14-3. This amount was alleged to comprise Rs. 1,500 due by way of rent of premises No. 8, Mullick Street, in Calcutta for 3 months (*Pous*, *Magh* and *Falgoon*, 1321 B. S.), Rs. 82-14-3 in respect of the occupier's share of the consolidated rates in respect of the said premises, and Rs. 700, the balance due, after payment of Rs. 1,000 on the 6th October 1913, under a guarantee given by the defendant to the plaintiff in respect of the rent of the said premises payable to the plaintiff by one Singeeram Poddar, a sub-tenant of the defendant. The defendant in his written statement pleaded that he had paid Rs. 500 as rent for *Pous*, 1321, leaving the balance Rs. 1,000 for rent for *Magh* and *Falgoon*, 1321, due to the plaintiff, that he had further paid the sum of Rs. 1,500 out of the sum of Rs. 1,700 due the plaintiff in respect of the guarantee, and that including the amount of his share of the consolidated rates there was the sum of Rs. 1,282-14-3 only still unpaid and payable to the plaintiff.

The suit was tried by Mr. Justice Greaves, who came to the clear and distinct finding that the sum of Rs. 1,000 which the defendant claimed to have paid

1917

NANDALAL MULLICK v. PANCHANAN MUKERJEE.

the plaintiff had not been paid, that the receipt had been a forgery and that the defendant ought not to be believed and passed a decree in favour of the plaintiff on the 6th March, 1916. The defendant, on the 13th March, applied for a review of this decree on the ground of the discovery of new and important matter and evidence, purporting to be an entry dated the 3rd *Chait*, 1231 B. S. (17th March, 1915), in the plaintiff's *Rokar* book for the Bengali year 1321, which was not within his knowledge and could not be produced by him at the trial. The entry purported to state that Rs. 1,000 had been paid on the 13th March, 1915, by the defendant to the plaintiff. Mr. Justice Greaves granted a Rule, calling upon the plaintiff to show cause why the said decree should not be reviewed and why the suit should not be set down on the peremptory list of suits for hearing. On the 24th March, 1916, the Rule came on for hearing and the Court directed an issue to be tried as to whether the said entry had been in the said *Rokar* book at the time of the hearing of this case, or had been inserted since. The said *Rokar* book had been put in as an exhibit in Court at the trial of the plaintiff's suit and had been in the custody of the Court officer ever since it had been exhibited and was in Court at the time of the hearing of the Rule. The said issue came on for trial and on the 19th April, 1916, Mr. Justice Greaves held that the entry in question was in the *Rokar* book when he tried the case and had not been inserted subsequently, and made the Rule absolute. The plaintiff, thereupon, appealed.

Mr. S. R. Das and *Mr. C. C. Ghose*, for the appellant.

Mr. H. D. Bose, *Mr. A. N. Chaudhuri* and *Mr. N. N. Bose*, for the respondent.

1917

NANDALAL MULLICK v. PANCHANAN MUKERJEE.

SANDERSON C. J. This is an appeal from a judgment of Mr. Justice Greaves, and it is a case, in my opinion, of considerable importance, having regard to one of the issues which has been raised.

The suit was for a sum of Rs. 2,282-14-3 pies. But in fact the only dispute was as to whether the defendant had paid the sum of Rs. 1,000, which was a part of the sum for which the suit was brought.

The learned Judge when he tried the case gave his decision on the 7th of March, 1916, and he came to the conclusion that an alleged receipt in respect of Rs. 1,000 in question which was put forward by the defendant was a forgery and had not been signed by the plaintiff. He also expressed a strong opinion with regard to the way in which the witnesses gave their evidence. He said: "If I have to choose between the evidence of the plaintiff and the defendant, I would unhesitatingly prefer the evidence of the plaintiff. So far as I could see, he seemed to me a truthful witness," and later on he said: "Having regard to this fact," (referring to the signatures which were put before him), "and also the demeanour of the witnesses in the witness-box, I think my judgment in this case ought to be in favour of the plaintiff."

Then an application for review of that judgment was made by the defendant on the 13th of March, 1916, and it was based upon the allegation that fresh evidence had been discovered, and the fresh evidence which was alleged to have been discovered was an entry in one of the plaintiff's books, which was under date the 17th of March, 1915, purporting to state that this Rs. 1,000 had been paid on the 13th of March, 1915. The actual entry translated by my learned brother Mr. Justice Mookerjee—a translation which was adopted by both the learned counsel in the case—was to this effect: The account was called "a deposit or

1917

NANDALAL MULLICK v. PANCHANAN MUKERJEE.

SANDERSON C. J.

suspense account"—there was a word which might be translated as deposit or suspense and we might read it as a deposit account or a suspense account as you prefer to translate it. "Received Rs. 1,000 from Panchanan Mookerjee, belated the 29th *Falgoon* on account of Singheeram Poddar on account of rent Rs. 1,000."

I ought to have mentioned that this Rs. 1,000 which, it was alleged, had been paid was supposed to be in respect of one month's rent which was due from the defendant himself in respect of the premises in question and also in respect of Rs. 500, part of a sum which the defendant was bound to pay under a guarantee which he had given for one Singheeram Poddar, one of the sub-lessees of the said premises.

Then the learned Judge upon this application for review directed an issue to be tried, and the issue was whether this entry was in the *Rokar* book at the time of the hearing of the case, or had been inserted since. Upon that issue the learned Judge came to the conclusion that the entry was in the *Rokar* book when he tried the case, and had not been inserted subsequently. He, therefore, granted the review, but he did not follow the procedure which is directed by the Order XLVII, rule 8 of the rules under the Civil Procedure Code, which provides that "when an application for review is granted, a note thereof shall be made in the register and the Court may at once re-hear the case or make such order in regard to the re-hearing as it thinks fit." He proceeded to give judgment for the defendant, on all the facts of the case which had been proved before him both in the first trial and also at the hearing of the issue. It was, however, agreed by the learned counsel in this Court that no objection should be taken upon the ground that the learned Judge had not strictly

followed the procedure which is laid down by Order XLVII, rule 8, but that it should be taken that he had retried the case and had given judgment for the defendant on all the facts of the case.

When the case comes to this Court, first of all, there is an appeal from the learned Judge's decision that there ought to be a review: and, secondly, there is an appeal from his decision in favour of the defendant upon all the facts of the case.

Now, in respect of the first matter, I think that this case is of general importance, namely, the question whether there ought to have been a review.

The other point is undoubtedly of importance to the parties themselves, because there is a sum of Rs. 1,000 involved and considerable costs which have been incurred, but that point is not of general importance.

Now, with regard to the question whether there ought to have been a review, the learned Judge has exercised his discretion and has granted it, and, in my judgment, it is not possible for us on this appeal to say that he ought not to have made an order for a review for this reason. It is admitted by the learned counsel for the appellant that Order XLVII, rule 1, (*1*) of the rules under the Civil Procedure Code is applicable to this case, and that rule provides as follows:— "Any person considering himself aggrieved by a decree or order from which an appeal is allowed, but from which no appeal has been preferred . . . and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent or on the face of the record, or for any other sufficient reason, desires to obtain a review of the

1917

NANDALAL MULLICK v. PANCHANAN MUKERJEE.

SANDERSON C. J.

decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order." Then there is rule 4 of that Order which provides: (i) "Where it appears to the Court that there is not sufficient ground for a review, it shall reject the application.' (ii) "Where the Court is of opinion that the application for review should be granted, it shall grant the same: Provided that . . . . . no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made, *without strict proof* of such allegation." The matter does not rest there, because rule 7 provides: "An order of the Court rejecting the application shall not be appealable; but an order granting an application" (which was the case here) "may be objected to on the ground that the application was (*a*) in contravention of the provisions of rule 2" (it does not apply to this case), "(*b*) in contravention of the provisions of rule 4 . . . . Such objection may be taken at once by an appeal from the order granting the application or in any appeal from the final decree or order passed or made in the suit." Therefore, in my judgment, we are limited to seeing whether the application was granted by the learned Judge in contravention of the provisions of rule 4. To go back to the provisions of rule 4 (2) (*b*), it says, there must be strict proof of such allegation. What is the allegation? The allegation is that "the matter or evidence was not within the applicant's knowledge or could not be adduced by him when the decree or order was passed or made." Now, having regard to the evidence which has been referred to by the learned Judge, I cannot say that there was not *strict proof* of those facts, namely, that the applicant had not

knowledge of the new evidence or that he could not have adduced it at the time of the trial. I think it is only necessary to mention the fact that the book in which the entry was made had not been produced until the trial of the action. In fact the plaintiff had claimed his right to limit the inspection to the entries which he swore were relevant to the matter in issue, and it was not until the case was being heard before the learned Judge that the defendant's attorney had the first opportunity of looking at the book generally: and, I think it was quite possible, as was pointed out by the learned Judge, that the learned Counsel for the defendant when he was in the act of cross-examining, although he looked through the book, might have missed the entry, especially as he was not looking for this particular entry, but he was looking for other entries to prove that the receipts of money were not always entered on the particular dates on which the money was received. Further, the evidence is not such that it is possible to say that during the course of the cross-examination the defendant's attorney ought to have seen or must have seen the entry in question, if it was there. Consequently, I do not think that this application for a review was granted in contravention of rule 4 of Order XLVII.

But having regard to the argument which has been addressed to us on the one side as well as on the other, during the course of the appeal as to the principle on which a review ought to be granted, when it is asked for upon the allegation that fresh evidence has been discovered, I think it is right to express my judgment with regard to the principle which ought to be acted upon in future with regard to such cases.

In my judgment, it is most important that there

1917

NANDALAL MULLICK v. PANCHANAN MUKERJEE.

SANDERSON C. J.

should be some finality in the trial of cases, and the greatest care ought to be exercised in granting a review, when that review is asked for upon the allegation that fresh evidence has been discovered since the judgment was given. It must be obvious to every one that unless great care is exercised when such an application is made, the door may be thrown open to all kinds of abuses. It is so easy to the party who has lost his case, to see what the weak part of his case was, and the temptation to try and procure evidence which will strengthen that weak part and put a different complexion upon that part of the case must be very strong.

I do not think that I can do better than refer to two authorities upon that point which were referred to in the course of the argument. The cases to which I desire to refer are first *Young* v. *Kershaw* (1) in which the judgments were delivered by Lord Justices A. L. Smith, Collins and Williams. Lord Justice A. L. Smith said this, "It seems to me that the cases which have been referred to show that a new trial may be granted"—I may say in passing that in this respect the question whether a review may be granted is the same as whether a new trial may be granted—"if new evidence, which could not have been obtained before, has been discovered which, if it had been adduced at the trial would have been conclusive so that the verdict must have been found otherwise than it was. I think that is the rule apart from all the authorities, which I will not discuss. That being so, what is the new evidence in this case which the defendant has discovered? Would that evidence have been conclusive of this case if it had been adduced at the trial? In my opinion it is evidence obtained under suspicious circumstances and

(1) (1899) 81 L. T. 531 ; 16 T. L. R. 52.

for that reason alone I think that it cannot be considered as conclusive." I draw attention to that, because the learned Judge in his judgment has said that the circumstances under which this evidence came to light were "curious and suspicious, not to say improbable." As I have said, I think, having regard to the provisions of Order XLVII, rule 7, this Court is debarred from going into this matter, and I am only dealing with it for the purpose of expressing the principle upon which the question now under discussion ought to be dealt with. Lord Justice Collins said: "It is obviously in the public interests that parties, who have gone through the ordeal of litigation and have had their rights settled at the trial, should not afterwards be allowed to patch up the weak parts and fill up the omissions in their case by means of fresh evidence. That is a rule of great importance. It is true that in special and exceptional circumstances a new trial has been granted because new evidence has been discovered. But the rule which permits that to be done is fenced round with many limitations. The party asking for the new trial must show that there was no remissness on his part in adducing all possible evidence at the trial. Then, again, as to the class of new evidence, the rule is that the new evidence must be such that, if adduced, it would be practically conclusive—that is evidence of such a class as to render it probable almost beyond doubt that the verdict would be different. In some of the cases which have been cited the new evidence came in to corroborate evidence which was, although not contradicted, weak at the trial, and that corroboration made the previous weak, but uncontradicted, evidence practically conclusive. The other cases were cases in which the new evidence consisted of documents which were not impeached and were conclusive" Lord Justice

1917

NANDALAL MULLICK v. PANCHANAN MUKERJEE.

SANDERSON C. J.

Williams said: "I do not believe that the Court can grant a new trial simply because there is new evidence, which was not available at the trial, unless it can also be shown that the verdict was based on mistake, surprise, or fraud, and that another jury ought therefore to consider the matter." Again, in the House of Lords in the case of *Brown* v. *Dean* (1), the Lord Chancellor, Lord Loreburn, in discussing the same point said at page 374, "when a litigant has obtained a judgment in a Court of Justice, whether it be a County Court or one of the High Courts, he is by law entitled not to be deprived of that judgment without very solid grounds: and where (as in this case) the ground is the alleged discovery of new evidence, it must at least be such as is presumably to be believed, and if believed would be conclusive."

These are the principles which in my judgment ought to be applied to an application for a review which is based upon the allegation that new evidence has come to light since the judgment was given. The learned Judge in this case in the exercise of his discretion granted a review; and, as I have already said, by reason of the provisions of Order XLVII it is not open to us to revise that Order, because I do not think that it can be said that the provisions of rule 4 of that Order have been contravened. Having said that, I must come to the conclusion that the appeal with regard to the question as to whether the learned Judge was right in granting the review, must be dismissed.

Then I come to the question whether the learned Judge's judgment upon the facts of the case ought to be upheld: and, here I think this Court is placed in a position which is different from that in which the Court is often placed in a case where it is an appeal

(1) [1910] A. C. 373.

from the judgment of a learned Judge upon a pure question of fact, at a trial in the ordinary course of events. I have said so many times that I hardly need repeat it now, that in an ordinary case, where the appeal is upon a question of fact, where the learned Judge of the Court of first instance has heard and seen the witnesses and has come to a conclusion upon the question of fact upon the evidence on the one side and on the other, there is a very great *onus* upon the shoulders of the appellant when he comes to this Court and asks it to overrule the decision of the learned Judge upon the question of fact. But this is not a case such as I have described. The circumstances of this case are peculiar, and I should think, probably they may never be repeated. In my experience I have never come across a case at all like it, because the position is this. The plaintiff brought his action for the recovery of Rs. 2,282 and it is alleged that he did so knowing that he had given a receipt for Rs. 1,000 a part of that sum, knowing that he had in his *Rokar* book an entry which would show that the money was paid in accordance with the defence that was set up by the defendant, knowing that though perhaps for a time he might by swearing falsely conceal that entry, knowing, at all events his advisers must have known, that sooner or later that book would probably be inspected, and the entry would come to light, and knowing all that, he brought his action for the sum. The learned Judge having heard the case, and having considered it, and having dealt with the evidence on the one side as well as on the other came to the distinct conclusion that the truth lay upon the side of the plaintiff, that the receipt in question in respect of the Rs. 1,000 was a forgery and that the money had not been paid, and that the plaintiff was a witness of truth and the defendant was not a witness of

1917

NANDALAL MULLICK v. PANCHANAN MUKERJEE.

SANDERSON C. J.

truth. Then comes the other evidence and the learned Judge had to approach this further evidence, namely, the production of the entry from this point of view, that the circumstances under which the evidence came to light were curious and suspicious not to say improbable: and, I am not surprised that the learned Judge came to that conclusion having regard to the story told by the defendant as to how he came to know that there was this entry in existence. I need not repeat the story in detail. But the suggestion is that a few days after the trial, as the defendant was going home from the High Court,—he had to pass the plaintiff's house on the way to his own house. Just when he was approaching the plaintiff's house he saw the plaintiff's brother-in-law and the servant Akhoy coming out of the house and he heard them talking about the case which had just been decided, and the plaintiff's brother-in-law expressing admiration to Akhoy as to how the difficulty of the receipt had been got over. I had better quote the defendant's own evidence as to this. He says: "The brother-in-law said, you have performed a feat, you have done an extraordinary thing. You have done away with the receipt granted with Nunda's own hand. Akhoy then said: 'There is nothing extraordinary in this. There is a credit of Rs. 1,000 on the 3rd *Chaitra*, but in spite of this application they could not see it.' He mentioned the date of 3rd *Chaitra*. He did not mention the date of payment. Then the brother-in-law said: "Charu Babu has cleverness." I should have thought that that story in itself was highly improbable but there were other circumstances which lead me to believe that that story may be described not only as "curious and suspicious, not to say improbable," but one which could not be accepted. I need not go further than to say that I agree

with the description which the learned Judge gave to it.

Now, there are several other matters which are relevant to the consideration of the point at issue.

Looking at the entry itself and here I speak—like the learned Judge in the Court below—with some hesitation because I have not the advantage which the learned Counsel on both sides and my learned brother have, of knowing the language in which the entry was made, and, therefore I confine myself to saying this: it is obvious it is written in a different ink to the other entries which are on the same page. It is also obvious that it is the only credit entry on that page, and, therefore, it is difficult to understand why this came to be written in a different ink and with a different pen, and if that was made in the ordinary course of business one would have expected it to have been made by the same person who made the entries on the debit side with the same ink and same pen. There is something more important than this. It is not, I understand, disputed that every one of the entries upon that page on the debit side have been carried forward to the ledger by the person who was employed to do that, the entries are ticked and they are carried forward to the ledger. If this entry was made in the ordinary course of business it must have been made, as the defendant's case is, on the 17th of March. But I do not see why this entry was not ticked and carried forward in the ledger. This point, however, is not confined to that page. The defendant is not able to put before the Court a single other entry in that cash-book, which was not carried forward in the ledger except the one which is in dispute. This, to my mind, is evidence which points strongly to the fact that the entry did not come into existence in the ordinary course of business. But

1917

NANDALAL MULLICK v. PANCHANAN MUKERJEE.

SANDERSON C. J.

it is urged by the defendant that the receipt was obviously written, first of all, as regards the body of it, by Akhoy, and, secondly, as regards the signature by the plaintiff. I do not intend to express any opinion upon that, because I do not like to base my judgment upon the observations which I made during the course of the case as regards the handwriting, although I have with the assistance of my learned brother observed some things. I am content to say that the learned Judge who saw the witnesses, and heard them give their evidence and who himself compared the signature in question with other admitted signatures of the plaintiff, and who was in a far better position to judge of it than I am, did come to the conclusion that that was not the plaintiff's signature, and I am content to adopt his conclusion.

These are some of the reasons which make me think that the evidence with regard to the entry in the *Rokar* book is unsatisfactory, and if I had been the learned Judge who had to exercise his discretion as to whether he would grant a review or not, I would have refused, because the evidence came into existence under suspicious circumstances and was not in itself conclusive, inasmuch as there was a conflict of evidence as to whether it existed at the time of the trial or not. There is evidence on the one side as well as on the other side, and if there be a doubt as to whether the evidence as to the existence of the entry at the date of the trial ought to be accepted or not, it is difficult to see how it can be said to be conclusive. I have, however, already said that we are bound by the rule to which I have referred, and we cannot go into the matter of the review. But the nature of the evidence and the circumstances under which it came into existence are material when I am considering the question whether the learned Judge upon all the facts

of the case ought to have in effect overruled his previous decision. In my judgment, the evidence with regard to this entry is of such an unsatisfactory nature and it came into existence in such an unsatisfactory way and the learned Judge was apparently in such doubt as to whether it should be accepted, that it ought not to be taken as sufficient to overrule the distinct and clear opinion which he had formed, namely, that the money had not been paid, that the receipt had been a forgery, and that the plaintiff ought to be believed.

For these reasons, emphasizing again as I do, that this is not an ordinary case of an appeal from a judgment upon a question of fact but that it is a case out of the ordinary, and with peculiar circumstances, in my opinion, the learned Judge's judgment on the previous occasion when he came to the conclusion that the money had not been paid, ought to be upheld, and judgment ought to be given in favour of the plaintiff.

The result is that the appeal against the review is dismissed. The appeal against the final decree of the Court of first instance is allowed and judgment for the plaintiff is to be entered, with costs of both hearings in the Court of first instance. The plaintiff will have the costs of the appeal except one day's costs which are to be defendant's and set off against the plaintiff's costs.

MOOKERJEE J. This appeal raises two distinct questions: the first relates to the propriety of the order made by Mr. Justice Greaves on an application for review of judgment presented to him on the 13th March, 1916; the second relates to the correctness of the final decree made by him on review, in modification of the decree made at the original trial.

1917

NANDALAL MULLICK v. PANCHANAN MUKERJEE.

MOOKERJEE J.

The plaintiff instituted this suit for recovery of a sum of money from the defendant. The defendant pleaded that the plaintiff had not allowed him credit for Rs. 1,000 which he had paid on the 13th March, 1915, and for which he held a receipt. Mr. Justice Greaves, who tried the suit, came to the conclusion that the receipt was not genuine and that on the oral evidence the defendant had failed to prove the plea of payment. The result was that the claim was decreed in full on the 7th March, 1916. Six days later, the defendant made an application for review of judgment under Order XLVII, rule 1, sub-rule (*l*) of the Civil Procedure Code, 1908, on the ground that he had discovered new and important evidence which was not within his knowledge and could not have been, by the exercise of due diligence, produced by him at the time when the decree was passed. The new evidence consisted of an entry in an account book filed by the plaintiff at the trial, which recited the alleged payment of Rs. 1,000 by the defendant. The application for review was heard in due course and was granted, notwithstanding the assertion of the plaintiff that the entry was not in the account book when it was filed in Court on his behalf and must have been interpolated therein, after the close of the trial, at the instance and for the benefit of the defendant. Upon this disputed question of fact, Mr. Justice Greaves came to the conclusion that he could not hold, upon the evidence, as he would otherwise have done but for the seeming impossibility of any subsequent insertion of the entry, that the entry was not in existence when he tried the case.

The procedure prescribed by rule 8 of Order XLVII was, however, not strictly followed, and the case was not reheard but a decree was forthwith made in modification of the decree made at the original trial and

credit was allowed to the defendant to the extent of Rs. 1,000.

The present appeal by the plaintiff was at first argued as an appeal directed against the order granting the review, but it was subsequently agreed between the parties that the appeal should be deemed as directed not merely against the order granting the review but also as against the final decree made in the suit. We have now to consider the questions raised in the appeal thus widened in scope by consent of parties.

Now, in so far as the appeal is directed against the order granting the review, it is clear that the scope of the appeal is restricted by rule 7, sub-rule (*1*), clause (*b*) of Order XLVII of the Code, the provisions of which are to this effect: "An order granting an application may be objected to on the ground that the application was in contravention of the provisions of rule 4"; and rule 4 prescribes in clause (*b*) of the proviso that "no application for review shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made, *without strict proof of such allegation.*" Consequently, under rule 7, an order granting an application for review may be attacked by way of appeal on the ground that the application has been granted on the ground of discovery of new evidence without strict proof of the allegation of the applicant that such new evidence was not within his knowledge or could no be adduced by him when the decree was passed. In the case before us, Mr. Justice Greaves has held and, as the materials on the record show, correctly held that there was such *strict proof.* In these circumstances, it is not open to this Court as the Court of Appeal to consider the question of the sufficiency of proof at the invitation of the

1917

NANDALAL MULLICK v. PANCHANAN MUKERJEE.

MOOKERJEE J.

appellant. This view is supported by a long series of decisions in this Court, to which reference will presently be made. But the appellant has invited our attention to Order XLIII, rule 1, clause (*w*) of the Code, which allows an appeal against an order granting a review, and has contended that the appeal thereby given is not restricted in its scope. In my opinion, this contention is not well founded and is opposed to the decisions in *Jagar Nath Prosad Singh* v. *Ramavatar Singh* (1) and *Hari Charan Saha* v. *Baran Khan* (2). These cases recognise the principle that Order XLIII, rule 1, clause (*w*) must be read as controlled by rule 7, Order XLVII of the Code. This is emphasised by the decision in *Ahid Khondkar* v. *Mohendra Lal De* (3). In that case, an application for review had been granted by the Court of first instance on the grouud of discovery of new evidence after the trial. An appeal was preferred against that decision, and the Court of Appeal came to the conclusion that there had not been sufficient proof of the allegation that the new evidence was not within the knowledge of the applicant and could not have been adduced by him when the decree was passed. A second appeal was preferred to this Court and was heard by Mr. Justice N. R. Chatterjea, who held that the Court of Appeal below was competent to determine the question of the sufficiency of the evidence adduced in support of the allegation made by the applicant, as otherwise the provision for appeal would be meaningless. An appeal was then preferred under clause 15 of the Letters Patent and was heard by Sir Lawrence Jenkins C. J. and Mr. Justice Woodroffe, who held that the expression "strict proof" means proof according to the formalities of the law and has

(1) (1911) 14 Ind. Cas. 39.
(2) (1914) I. L. R. 41 Calc. 746.
(3) (1915) I. L. R. 42 Calc. 830; 19 C. W. N. 804.

no reference to the sufficiency of the *quantum* of evidence adduced. The result was that the judgment of Mr. Justice N. R. Chatterjea was reversed and the case was remanded for consideration of other points which arose in the appeal. See also *Indar Koer* v. *Baldeo Baksh* (1). We are thus limited to the consideration of the question, whether there was strict proof, that is, proof, according to the formalities of law, of the allegation that the new evidence was not within the knowledge of the applicant and could not have been adduced by him at the original trial. That there was a strict proof in this sense cannot be disputed. It is, consequently, not open to us to reverse the order whereby review was granted by Mr. Justice Greaves on the ground that the evidence was not sufficient to support his conclusion. But as the case is of considerable importance, I feel bound to record my concurrence in the opinion expressed by the learned Chief Justice that the procedure followed was contrary to well-established principles. The decisions in *Young* v. *Kershaw*(2) and *Brown* v. *Dean*(3) emphasise the care to be exercised in granting an application for review of judgment on an allegation of discovery of new matter or evidence; the new evidence must at least be such as is presumably to be believed, and if believed, would be conclusive: *see* also *Warham* v. *Selfridge & Co., Ld.*(4). I may add that the same view has been taken by the Judicial Committee in two recent cases, namely, *Turnbull & Co.* v. *Duval* (5) and *Kessowji Issur* v. *Great Indian Peninsular Railway Company* (6). In the first of these cases, Lord Lindley observed that a new trial ought never to be lightly granted; and, he

(1) (1910) 13 Oudh Cas. 248.
(2) (1899) 81 L. T. 531; 16 T. L. R. 52.
(3) [1910] A. C. 373.
(4) (1914) 30 T. L. R. 344.
(5) [1902] A. C. 429.
(6) (1907) L. R. 34 I. A. 115.

1917

NANDALAL MULLICK v. PANCHANAN MUKERJEE.

MOOKERJEE J.

held with reference to the circumstances of that case, that no case of fraud or surprise had been made out. In the second case, Lord Robertson pointed out the dangers inseparable from the grant of an application for review of judgment on an allegation of discovery of new matter or evidence. In that case, an application was made to the trial Court for review of judgment on the ground of discovery of new matter or evidence. That application was refused. On an appeal preferred against the decision of the trial Court, an application was made to the Court of Appeal to receive such additional evidence. The Appeal Court acceded to this prayer, and on the evidence so admitted, taken with the evidence previously on the record, reversed the decision of the trial Court. The Judicial Committee condemned this procedure and held that the additional evidence which it was alleged had been discovered after the decision of the trial Court should never have been received. I cannot consequently see any escape from the conclusion that, in the case before us, the additional evidence should not have been received and should not have been accepted as a ground for granting the application for review. But, as I have already said, it is not open to this Court, under rule 7 of Order XLVII, to reverse the order of Mr. Justice Greaves on this ground.

We have next to consider the appeal in so far as it assails the correctness of the decree ultimately made by Mr. Justice Greaves in modification of the decree made by him at the first trial. The question in controversy relates to the alleged payment of Rs. 1,000 by the defendant to the plaintiff on the 13th March, 1915. The evidence may be divided into oral testimony and documentary proof. In so far as the oral testimony is concerned, we have oath against oath. Mr. Justice Greaves who had the opportunity of

seeing the witnesses expressly stated in his first judgment that the evidence on the side of the defendant was untrustworthy and that, if he had to choose between the plaintiff and the defendant, he would, without hesitation, accept the testimony of the plaintiff; he further described the demeanour of the witnesses on behalf of the defendant as unsatisfactory. Under such circumstances, I am not prepared to take a different view of the value of the oral testimony from what has been adjudged by the trial Judge. As regards the documentary evidence, we have two important items, namely, *first*, a receipt alleged to have been given by the plaintiff to the defendant; and, *secondly*, an entry alleged to have been made in the account book produced at the trial by the plaintiff. As regards the receipt, Mr. Justice Greaves pronounced against its genuineness. We have been invited in this Court to compare the signature on the receipt with the various admitted signatures of the plaintiff on the record; but, as pointed out by the Judicial Committee in *Kurali Prasad Misser* v. *Anantaram Hajra* (1), it is by no means safe to base our conclusion upon a mere comparison of handwriting without proper materials on the subject: *Shankarrao Gangadhar* v. *Ramji Harjivan* (2). Consequently, I must hold that the view taken by Mr. Justice Greaves that the receipt was not genuine has not been successfully attacked in this Court. There remains finally the entry in the account book. That entry is of the most suspicious character, and I am by no means convinced that it was in fact in existence at the date of the first trial On the strength of evidence of such doubtful value, I cannot hold that the defendant has discharged the burden which lay upon him to establish his plea of payment.

(1) (1871) 8 B. L. R. 490. (2) (1903) I. L. R. 28 Bom. 58.

1917

NANDALAL MULLICK v. PANCHANAN MUKERJEE.

On these grounds, I agree that this appeal must be allowed and the first decree of Mr. Justice Greaves restored.

O. M.

Attorney for the appellant: *C. C. Bose.*

Attorney for the respondent: *Abhas Chandra Ghosh.*

CRIMINAL REVISION.

Before Teunon and Newbould JJ.

1917

April 16.

GANESH CHANDRA SIKDAR

v.

EMPEROR.*

"*Excisable Article*"—*Bonâ fide medicinal preparation containing alcohol—Unlicensed manufacture and sale of such—Excise Act* (*Beng. V of 1909*), *ss. 2* (*7*) (*14*) *& 46* (*a*) *as amended by Beng. Act VII of 1914.*

A medicinal preparation containing alcohol (ranging from 68·3 °/₀ to 87 °/₀ proof) is an "excisable article" within the meaning of the Bengal Excise Act (V of 1909), s. 2 (7) (*14*), as amended by Beng. Act VII of 1914.

Gonesh Chunder Sikdar v. *Queen Empress* (1), *Mati Lal Chandra* v. *Emperor* (2), *Satish Chandra Roy* v. *King-Emperor* (3) declared obsolete.

THE first petitioner was the father of the second, and a *kobiraj* by profession. It appeared that they had for many years manufactured and sold a preparation, called *Mrita Sanjibani Sudha*, said to be a specific for diseases after child-birth, based on the Ayurvedic Pharmacopœia. Between the 10th September,

* Criminal Revision No. 246 of 1917, against the order of Alfred Bose, Deputy Magistrate of Goalundo, dated Feb. 9, 1917.

(1) (1896) I. L. R. 24 Calc. 157. (2) (1912) I. L. R. 39 Calc. 1053.
(3) (1913) 17 C. W. N. 939.

and the 5th October, 1916, they had sold to one Upendra Nath Chowdhury a bottle of the medicine which, on analysis by the Chemical Examiner, was found to contain alcohol 85·5 °/₀ proof. Their premises were searched and several phials of the same were seized. On examination, alcohol from 68·3 °/₀ to 87 °/₀ proof was discovered in the mixture.

The petitioners were tried by the Subdivisional Officer of Goalundo for the manufacture and sale of an excisable article without license under section 46 (*a*) of the Bengal Excise Act (Beng. V of 1909) read with s. 2 (*7*) (*14*) of the same as amended by Beng. Act VII of 1914. They admitted the manufacture and sale, but contended that their preparation was a *bonâ fide* medicinal specific for diseases after child-birth, that the basic ingredients were *gur*, ginger, betel-nut, and certain barks, and that the compound after fermentation and the addition of spices, crushed fruits and *babla* skins, was subjected to distillation. They were, however, convicted and sentenced, on the 9th February, 1917, to a fine of Rs. 200 each, and in default to six weeks' rigorous imprisonment.

They then moved the High Court and obtained the present Rule.

Babu Manmatha Nath Mukerjee (with him *Babu Phanindra Lal Mitra*), for the petitioners. The petitioners have manufactured and sold this preparation for a long time. The same medicine was held to be a *bonâ fide* drug by the High Court in 1896 in *Gonesh Chunder Sikdar* v. *Queen-Empress* (1), and to be outside the scope of the Bengal Excise Act. A *bonâ fide* medicinal preparation does not fall within the purview of the present Excise Act: *Mati Lal Chandra*

(1) (1896) I. L. R. 24 Calc. 157.

1917

GANESH CHANDRA SIKDAR v. EMPEROR.

v. *Emperor* (1) and *Satish Chandra Roy* v. *King-Emperor* (2).

The Offg. Advocate-General (*Mr. B. C. Mitter*) and *the Offg. Deputy Legal Remembrancer* (*Mr. J. Camell*), for the Crown, were not called upon.

Cur. adv. vult.

TEUNON AND NEWBOULD JJ. In this case the petitioners before us have been convicted in respect of the manufacture and sale of a liquid substance spoken of as *Mrita Sanjibani Sudha*, and have been sentenced, under section 46 (*a*) of the Bengal Excise Act (V of 1909), each to pay a fine of Rs. 200 or in default to undergo six weeks' rigorous imprisonment.

The manufacture and sale is admitted and the contention of the petitioners, who are *kobirajes* by profession, is that *Mrita Sanjibani Sudha* is a beneficent drug, prepared in accordance with a formula to be found in an Ayurvedic Pharmacopœia, and used for medicinal purposes only. The ingredients, it is said, are *gur*, ginger, betel-nut, and various barks, and after a certain period of fermentation from this base with certain additions in the shape of spices, crushed fruits and *babla* skins, the finished product is obtained by a process of distillation. The preparation, there is evidence, is prescribed for women suffering from fever or bowel complaints after child-birth, and other virtues claimed for it are that it stimulates the appetite, aids digestion and, when taken at bedtime soothes the wakeful.

It may be conceded that the preparation possesses all these virtues, but the question still remains whether it is an "excisable article" within the meaning of the Bengal Excise Act. In that Act "excisable article"

(1) (1912) I. L. R. 39 Calc. 1053. (2) (1913) 17 C. W. N. 939.

has been defined as meaning "any liquor or intoxicating drug as defined by or under this Act" and in section 2, clause (*14*), as amended by Bengal Act VII of 1914, "liquor" has again been defined as meaning "liquid consisting of or containing alcohol", and as including various specified substances.

It is not disputed that *Mrita Sanjibani Sudha* contains alcohol, and analysis shows that the four sample phials or bottles submitted to the Chemical Examiner consisted of the usual volatile bye-products of distillation and fermentation, volatile essential oils, water and alcohol, the proportion of alcohol ranging from 68·3 °/₀ to 87°/₀. In other words the preparation as sold, or as prepared and put up for sale, is an alcoholic liquid varying in strength from 31·7 to 13 under-proof. There can, therefore, be no question that the manufacture and sale of this preparation, otherwise than in conformity with the provisions of the Excise Act, is an offence unless the petitioners can show that this article has been exempted by notification under the provisions of section 90 of the Act, or that by reason of "repugnancy in the subject" the definition is not applicable. It is conceded that the article is not within the terms of any notification issued under section 90. It is, however, contended that to *Mrita Sanjibani Sudha*, as a medicinal preparation manufactured, prescribed and sold by *kobirajes*, the definition contained in the Act does not apply, and in support of this contention reliance is placed on the cases reported in *Gonesh Chunder Sikdar* v. *Queen-Empress* (1), *Mati Lal Chandra* v. *Emperor* (2), *Satish Chandra Roy* v. *King-Emperor*(3). It is unnecessary to discuss these cases which were all decided prior to the amendment of the Act made in 1914. Whatever may

(1) (1896) I. L. R. 24 Calc. 157. (2) (1912) I. L. R. 39 Calc. 1053.
(3) (1913) 17 C. W. N. 939.

1917

GANESH CHANDRA SIKDAR v. EMPEROR.

have been the state of the law at the time when the foregoing cases were decided, the intention of the law has been made clear by the amended Act of 1914, and to say now that a preparation containing alcohol is not within the provisions of the Bengal Excise Act simply because it is a medicinal preparation, or may be used for medicinal purposes, would be to stultify this Court and ignore the plain purpose of the Legislature.

On the question of sentence, having regard to the fact that the manufacture of this *Mrita Sanjibani Sudha* has been continued on the strength of the decision in favour of the elder petitioner in *Gonesh Chunder Sikdar* v. *Queen-Empress* (1), and the further fact that it does not appear that prior to the present proceedings the petitioners were warned by the Excise authorities, we think that a lesser sentence will meet the ends of justice. We, therefore, reduce the sentence in each case to a fine of Rs. 100, in default three weeks' rigorous imprisonment.

E. H. M.

Conviction upheld.

(1) (1896) I. L. R. 24 Calc. 157.

PRIVY COUNCIL.

RAJ KUMAR THAKUR GIRIDHARI SINGH

v.

MEGH LAL PANDEY.

*P.C.**
1917

June 18, 19;
July 19.

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Lease, construction of—Mokarari Lease—Grant of Land "mai hak hakuk" (with all rights)—Mineral and other sub-soil rights—Rights not expressly included in terms of lease.

Held (reversing the decision of the High Court), that the expression "*mai hak hakuk*" ("with all rights") in a mokarari lease of land did not add to the true scope of the grant nor cause mineral rights to be included within it.

The essential characteristic of a lease is that the subject of it is one which is occupied and enjoyed, and the corpus of which does not in the nature of things and by reason of the user, disappear. Unless there be by the terms of the lease an express, or plainly implied, grant of mineral rights they remain reserved to the zamindar, there being no evidence of his having parted with them.

Hari Narayan Singh Deo v. *Sriram Chakravarti* (1), *Durga Prasad Singh* v. *Brojo Nath Bose* (2) and *Shashi Bhusan Misra* v. *Jyoti Prashad Singh Deo* (3) followed.

Megh Lal Pandey v. *Rajkumar Thakur* (4) overruled.

By the terms of the lease trees on the land were expressly transferred to the grantee; but mineral rights were not so included in its terms; and the presumption was, therefore, that the zamindar had not intended to transfer them, and they did not pass under the lease.

APPEAL No. 66 of 1910 from a judgment and decree (19th December 1906) of the High Court at Calcutta,

* *Present:* LORD DUNEDIN, LORD SHAW, LORD SUMNER, SIR JOHN EDGE, AND MR. AMEER ALI.

(1) (1910) I. L. R. 37 Calc. 723; L. R. 37 I. A. 136.
(2) (1912) I. L. R. 39 Calc. 696; L. R. 39 I. A. 133.
(3) (1916) I. L. R. 44 Calc. 585; L. R. 44 I. A. 46.
(4) (1906) I. L. R. 34 Calc. 358.

1917

RAJKUMAR THAKUR GIRIDHARI SINGH v. MEGH LAL PANDEY.

which reversed a judgment and decree (19th June 1905) of the Subordinate Judge of Manbhum.

The plaintiff was the appellant to His Majesty in Council.

The question for determination in this appeal is whether the respondents have, under a mokarari lease executed by the appellant, the sub-soil rights to coal and other minerals in the land leased to them.

The Subordinate Judge held that they had not the right to minerals under the soil.

The High Court (RAMPINI and MOOKERJEE JJ.) on appeal reversed that decision and held that, on the construction of the lease, the right to such minerals passed to the respondents.

The case on appeal to the High Court is reported in I. L. R. 34 Calc. 358 as *Megh Lal Pandey* v. *Rajkumar Thakur*. The facts are fully stated in the judgment of MOOKERJEE J. at page 363 of the report.

On this appeal,

De Gruyther, *K. C.*, and *A. M. Dunne*, for the appellant, contended that he was entitled to the coal and all other mineral and sub-soil in the land leased, and such rights did not pass to the respondents under the mokarari lease. Unless those rights are expressly granted, or a grant can be clearly implied from the terms of the lease, there was nothing to show that the zamindar has parted with them. The transfer of such rights cannot be implied from the fact that the lease is permanent and heritable. The most recent authorities are conclusive on the question. Reference was made to *Hari Narayan Singh Deo* v. *Sriram Chakravarti* (1), *Durga Prasad Singh* v. *Braja Nath Bose* (2)

(1) (1910) I. L. R. 37 Calc. 723; L. R. 37 I. A. 136.

(2) (1912) I. L. R. 39 Calc. 696; L. R. 39 I. A. 133.

and *Shashi Bhusan Misra* v. *Jyoti Prashad Singh Deo* (1). The words "*mai hak hakuk*" ("with all rights") in the lease were not sufficient to transfer to the respondents the right to minerals. Where rights are intended to be granted, as with regard to the right to trees, the terms were express; and where minerals are not mentioned, the presumption was that it was intended to exclude them from passing.

Sir H. Erle Richards, K.C., and *Sir William Garth*, for the respondents, contended that under the terms of the lease "all the rights" of the appellant passed without reservation to the respondents; and such rights were unqualified and perpetual. There was no exclusion of the right to minerals or other sub-soil rights. The lease was before the Board, which was not the case in most of the recent cases on the subject. "All the rights" must be presumed to include the right to dig coal. The cases of *Hari Narayan Singh Deo* v. *Sriram Chakrawarti* (2) and *Durga Prashad Singh* v. *Braja Nath Bose* (3) were distinguishable on the ground that in them it was not shown that the zamindar ever parted with his right to minerals under the soil. In the present case, he had, it was submitted, done so on the true construction of the mokarari lease. The only interest in the land remaining in the appellant was the right to receive the reserved rent, and a right of re-entry if the rent was not paid.

The appellant was not called upon to reply.

The judgment of their Lordships was delivered by

July 19.

LORD SHAW. The appellant is the proprietor of the zamindari of pergunnah Nawargarh, being Mahal

(1) (1916) I. L. R. 44 Calc. 585; L. R. 44 I. A. 46. (2) (1910) I. L. R. 37 Calc. 723; L. R. 37 I. A. 136.
(3) (1912) I. L. R. 39 Calc. 696; L. R. 39 I. A. 133.

1917

RAJ KUMAR THAKUR GIRIDHARI SINGH v. MEGH LAL PANDEY

No. 16 of the touzi of the Collectorate of District Manbhum.

In 1865 he executed a *mokarari pottah* of a small portion of Mouzah Baramashya "with all rights" (this being the translation of the expression "*mai hak hakuk*") "as per boundaries . . . . appertaining to my zamindari, the third kismat pergunnah Nawargarh, which is in my possession." An annual jumma was fixed of 59 rupees and 2 seers of ghee and 1 goat.

It is admitted that the possession was of a permanent and heritable character, subject to the payment of rent, failing which latter the *mokarari* "will be cancelled at the end of the year." There is also a clause as to trees in these terms:—

"You shall be entitled to the extra collections which will be realised in the village, and you shall take the prices of the trees of the same by cutting and selling them, to which I shall not have any right."

In 1903, minerals having been discovered below the surface of the land which was the subject of the *mokarari pottah*, the respondents began to work them, claiming that they had a right to do so in respect that the minerals were within the subjects of their *mokarari* lease. This claim was resisted by the appellant, who brought the present suit for injunction and damages. The appellant is the zamindar.

On the one hand, it is admitted that minerals were not expressly included within the terms of the *pottah*. On the other, that the terms were general, as above quoted, and that there was no exclusion of these minerals. The Subordinate Judge held that the *mokarari* lease did not pass the underground and mineral rights. The learned Judges of the High Court of Calcutta, on the 19th December, 1906, held that it did. They accordingly set aside the decree and judgment of the lower Court and dismissed the suit.

In their Lordships' opinion, the judgment and

decree of the High Court are erroneous, and those of the Subordinate Judge fall to be restored. It is unnecessary to enter into the general question of law, as, in their Lordships' opinion, that has been conclusively and recently settled by this Aoard. It is unavailing to urge that the right granted by the *mokarari pottah* to the lessee is of a permanent, heritable, and transferable character, as even although this be the case it does not advance the question of whether the lease itself embraced within its scope the mineral rights. On the contrary, unless there be by the terms of the lease an express or plainly implied grant of those rights, they remain reserved to the zamindar and are part of the zamindari.

Their Lordships refer to the judgment of the Board in *Hari Narayan Singh Deo* v. *Sriram Chakravarti* (1). In the case as reported in I.L.R. 33 Calc. p. 54, a clear finding had been made which may be cited from the judgment of Pargiter, J. :—

"There is no basis for holding that the underground rights have not passed as part of the tenure. To hold otherwise would be to hold that a tenant in perpetuity can never work mines, because they do not belong to his tenure ; and that the landlord can never work them, because he has no reversion and no right to enter on the land for that purpose . . . . In my opinion, the underground rights belong to permanent tenures."

This judgment was reversed by this Board, and it was held that the zamindar "must be presumed to be the owner of the underground rights thereto [that is, appertaining to the zamindari], in the absence of evidence that he ever parted with them." Their Lordships think it right to refer to this case because, in the judgment of the High Court, the Calcutta decision is referred to as if still law, this not being the case.

Hari Narayan Singh's case (1) was followed by that

(1) (1910) I. L. R. 37 Calc. 723 ; L. R. 37 I. A. 136.

1917

RAJ KUMAR THAKUR GIRIDHARI SINGH v. MEGH LAL PANDEY.

of *Durga Prasad Singh* v. *Braja Nath Bose* (1). This had reference to a claim for minerals underlying two mouzahs of a zamindari. The zamindar claimed them and the defendant also did so, he being in possession under a *digwari* tenure. This tenure is hereditary and inalienable, subject to the *digwar's* liability to be dismissed by the Government for misconduct. The judgment of the Board was pronounced by Lord Macnaghten to the effect "that it must be presumed that the mineral rights remain in the zamindar in the absence of proof that he had parted with them."

Finally, in *Shashi Bhushan Misra* v. *Jyoti Prashad Singh Deo* (2) and after a review of the decisions, it was held that the grant by a zamindar of a tenure at a fixed rent does not carry a right to the minerals. In the language of Lord Buckmaster :—

"These decisions, therefore, have laid down a principle which applies to and concludes the present dispute. They establish that when a grant is made by a zamindar of a tenure at the fixed rent, although the tenure may be permanent, heritable, and transferable, minerals will not be held to have formed part of the grant in the absence of express evidence to that effect."

On the general question, accordingly, one need not proceed further to consider the suggestion that the lessee in a *mokarari pottah* has right to the minerals by reason of the nature of such a grant. Such a suggestion stands negatived upon authority.

There are two points, however, which remain as applicable to the present case. It is said that minerals must be included because of the use of the expression "*mai hak hakuk*" in this *pottah*. On the assumption that the expression means "with all rights" or may be properly amplified as "with all right, title, and interest," such expressions, in their Lordships' opinion, do not increase the actual corpus of the subject

(1) (1912) I. L. R. 39 Calc. 696 ; L. R. 39 I. A. 133.

(2) (1916) I. L. R. 44 Calc. 585 ; L. R. 44 I. A. 46.

affected by the *pottah*. They only give expressly what might otherwise quite well be implied, namely, that that corpus being once ascertained, there will be carried with it all rights appurtenant thereto, including not only possession of the subject itself, but it may be of rights of passage, water or the like, which enure to the subject of the *pottah* and may even be derivable from outside properties. It must be borne in mind also that the essential characteristic of a lease is that the subject is one which is occupied and enjoyed and the corpus of which does not in the nature of things and by reason of the user disappear. In order to cause the latter specialty to arise, minerals must be expressly denominated, so as thus to permit of the idea of partial consumption of the subject leased. Their Lordships accordingly are of opinion that the words founded on do not add to the true scope of the grant nor cause mineral rights to be included within it.

A second point mentioned as a specialty in the present case is the reference in the *pottah* to the trees. The lessee is given power to cut and, if he cares, to sell these; and the zamindar renounces any right in them and their proceeds. Had the *mokarari pottah*, however, been a document which by its nature gave as in property the entirety of the land both on and below the surface, such a provision with regard to the trees would be entire surplusage. The point is not of great importance, but it negatives the idea that the *mokarari pottah* can be so comprehensively viewed. Such a lease is a lease of the surface only. This is the general case to which in the present case there is alone superadded a right to the trees. The minerals are not included.

Their Lordships will humbly advise His Majesty that the appeal should be allowed with costs here and

1917

RAJ KUMAR THAKUR GIRIDHARI SINGH v. MEGH LAL PANDEY.

below and the decree of the Subordinate Judge restored.

Appeal allowed.

Solicitors for the appellant: *T. L. Wilson & Co.*

Solicitors for the respondents: *T. C. Summerhays & Son.*

J. V. W.

PRIVY COUNCIL.

P.C. 1917*

June 14, 15, 18; *July* 19.

BRIJ INDAR SINGH

v.

KANSHI RAM.

[ON APPEAL FROM THE CHIEF COURT OF THE PUNJAB, AT LAHORE.]

Limitation- Limitation Act (IX of 1908) ss. 5, 14—General rule for exercise of judicial discretion to admit an appeal which would otherwise be time-barred— "Sufficient cause"—Reasonable diligence in prosecution of appeal—Deduction of time in prosecuting with due diligence an application for review of judgment—Order for abatement of suit—Civil Procedure Code, 1882, ss. 366, 368, 371—Revision allowed under s. 371—Order of abatement made ex parte—Judge refusing to follow general rule laid down by Full Bench case—Appellate Court can remit case or exercise discretion itself.

For the exercise of the judicial discretion allowed by section 5 of the Limitation Act, 1908, to admit, for "sufficient cause," an appeal which would be otherwise barred as being out of time, the case of *Karm Bakhsh* v. *Daulat Ram* (1) lays down a general rule that the true guide is whether the appellant has acted with reasonable diligence in the prosecution of his appeal; and he ought to be deemed to have so acted where, after deducting the time spent in prosecuting with due diligence a proper application for review of judgment, the period between the date of the

* *Present*: LORD DUNEDIN, LORD SHAW, LORD SUMNER, SIR JOHN EDGE AND MR. AMEER ALI.

(1) (1888) P. R. No. 183.

decree appealed from and the date of presenting the appeal does not exceed the period prescribed for preferring an appeal.

In re Brojender Coomar Roy (1), in which *Nobbo Kissen Singh* v. *Kaminee Dassee* (2) was followed, referred to.

This general rule, or one practically similar, has been adhered to by all the High Courts in India ; and the Judicial Committee will not interfere with such a rule of procedure so laid down.

Where a Judge purporting to exercise such discretion does so under the view that there is no general rule, when in fact there is one which he ought to follow as being binding on him, he misdirects himself as to the law to be applied to the case ; he cannot exercise a judicial discretion, and an Appellate Court should either remit the case, or exercise the discretion itself.

The remedy by revision given to the representative of a plaintiff by section 371 of the Civil Procedure Code, 1882, when an order for abatement of a suit has been made, is applicable whether the order has been made under section 366, on the death of a plaintiff, or under section 368, on the death of a defendant ; the words of section 371 being "where a suit abates under this chapter" which includes both sections 366 and 368.

An order abating a suit should not be made *ex parte*. The opposite party should be given an opportunity of appearing before any order for abatement is made.

The introduction of a plaintiff or a defendant for one stage of a suit is an introduction for all stages, even if it be made on an appeal from a mere interlocutory order.

APPEAL No. 70 of 1916 from the judgment (20th January 1911) of the Chief Court of the Punjab, which affirmed an order (16th March 1908) of the District Judge of Ferozepur.

The plaintiff was the appellant to His Majesty in Council.

The facts of the case are set out in the judgment of the Judicial Committee.

The judgment of the Chief Court (D. C. JOHNSTONE J.) appealed from was—

"In this case Mr. Shadi Lal puts in a double-barrelled objection to the

(1) (1867) B. L. R. Sup. Vol. 728 ; 7 Suth. W. R. 529.
(2) (1865) B. L. R. Sup. Vol. 349 ; 2 Suth. W. R. Mis. 85.

1917

BRIJ INDAR SINGH v. KANSHI RAM.

effect that either no appeal lies or, if it lies, it is barred by time. A few words will make the objection clear.

"On 16th March 1908, th District Judge declared that the suit had abated. On 8th April 1908, his successor in office set aside the order of abatement, in so far as it concerned the death of the plaintiff, His Highness the Raja of Faridkot, and on 24th April 1908 further held that, even in connection with the demises of two defendants, the suit had not properly abated. These orders were made the subject of revision in this Court—see No. 1450 of 1908—and on 6th April 1909 I set aside the order setting aside the order of abatement and restored the order of 16th March 1908. I ruled that under the Civil Procedure Code of 1882 while the proper remedy against an incorrect abatement order in connection with the death of a plaintiff (section 366) was reconsideration under section 371 of that Code, the remedy in the case of death of a defendant was by way of appeal; and I allowed that revision on the ground that in so far as they touched the abatement under section 368, Civil Procedure Code (demise of a defendant), the orders of 8th and 24th April 1908 were *ultra vires*.

"Mr. Shadi Lal's contention is as follows :—

"The District Judge's order of 16th March 1908 gave three reasons for abatement, (i) plaintiff dead and representative not brought on record in time; (ii) Joti Mal dead and representative not brought on record in time; (iii) G. H. Coates dead and representative not brought on record in time. No appeal lies as regards reason (i), and by order of Chief Court of 6th April 1909 the District Judge's original order of 16th March 1908 was restored and is now the only subsisting order. Hence there is no plaintiff and thus there is no one who can appeal. Further, it is contended that the appeal under section 588 (*18*) of the old Code against an order of abatement under section 368 has been taken away by the new Code—see Order XLIII, rule 1. This seems to me to be hardly correct. No doubt no appeal is stated in Order XLIII, rule 1, to lie against an order of abatement under Order XXII, rule 4 (old section 368), but by Order XLIII, rule 1 (*k*) an appeal lies against an order rejecting an application under Order XXII, rule 9, to set aside an abatement. The only change appears to be that the plaintiff must apply for reconsideration first to the Court that passed the order.

"As regards time-bar the argument is that the right to appeal accrued on 16th March 1908, the order of that date being the order it is now sought to set aside, while this appeal was instituted on 21st April 1909; and no sufficient ground for the application of section 5, Limitation Act. exists.

"Mr. Oertel has, I think, succeeded in refuting the first part of this preliminary objection of Mr. Shadi Lal. In my order of 6th April 1909,

I did not interfere with the order setting aside abatement in so far as it was concerned with death of plaintiff. After my order of 6th April 1909, though the suit could not go on as it was in abatement, there was a plaintiff who could take any further steps that might seem necessary.

"As regards time-bar, however, I am not with Mr. Oertel. He admits that the appeal is barred but for the application, if lawful, of section 5, aforesaid. In the memorandum of appeal the reasons given for non-presentation in time are (i) the proceedings in the Court of the District Judge in April 1908, the orders passed in which remained in force until 6th April 1909; (ii) the plaintiff being a minor. I have consulted authorities and may mention 118 P. R. 1908, and I. L. R. 10 All. 587; 184 P. R. 1889; 161 and 183 P. R. 1888; and 30 P. R. 1886. Each case has to be considered on its own merits. In the Allahabad case, though the question as to the proper remedy was a difficult one, the Judges held that a mistake of law on the part of the appellant was no sufficient ground for bringing in section 5. In 30 P. R. 1886 it was held that wrong advice of counsel was no ground, and that due diligence had not been shewn, 15 days being wasted after the mistake was known. In the present case also there was 15 days' delay of the same kind; and it must be borne in mind that the defendants protested against the plaintiffs' adoption of the remedy by review, under section 371, Civil Procedure Code, 1882, and still the plaintiffs persisted.

"The Allahabad ruling was not altogether approved of in 184 P. R. 1889, where it was held that pursuit of a remedy in good faith in a wrong Court might suffice to bring in section 5; but 118 P. R. 1908, which is almost identical with the present case, is hardly in accordance with the ruling of 1889, just quoted. The fact is that these cases depend so much for their decision on the special facts found in them that no general rule can be laid down. I think it is doubtful whether the two rulings of 1888, quoted above, would pass muster now; but as the facts there were very different from anything I have before me, I do not think I need express a definite opinion upon them.

"My finding is that the appeal probably lies, but that it is time-barred, and that section 5 of the Limitation Act cannot be invoked by the plaintiffs because the delay was not, in view of the defendants' protest against the proceedings by way of review (section 371 of Civil Procedure Code, 1882), and of the 15 days between discovery of the mistake and the presentation of the appeal, made in "good faith." I dismiss the appeal with costs."

On this appeal,

DeGruyther K. C. and *C. O'Gorman*, for the appellant, contended that the order of the District Judge

1917

BRIJ INDAR SINGH v. KANSHI RAM.

dated 24th April 1908 was right, and to make it was within his jurisdiction; the Chief Court was in error therefore in setting it aside and restoring the order of 16th March 1908 which was admittedly irregular. The Chief Court says that the cases in India lay down no general rule for the exercise of the judicial discretion under section 5 of the Limitation Act in admitting an appeal presented after the prescribed period. But, it is submitted, the cases do lay down a general rule as to "sufficient cause" under section 5, which is that an appeal is prosecuted with ordinary diligence if, after the deduction of the time occupied in diligently applying for a review, the prescribed period is not exceeded. This is analogous to the rule with respect to *suits* in section 14 of the Limitation Act. Reference was made to *Karm Bakhsh* v. *Daulat Ram* (1), *Balwant Singh* v. *Gumani Ram* (2), *Brij Mohan Das* v. *Mannu Bibi* (3), *In re Brojender Coomar Roy* (4) and *Nob'o Kissen Singh* v. *Kaminee Dassee* (5). The Chief Court relied on the case of *Ramjiwan Mal* v. *Chand Mal* (6). But that case on the point of "sufficient cause" was overruled by the Full Bench case of *Brij Mohan Das* v. *Mannu Bibi* (3) which error of the Judge caused a misdirection by himself in the exercise of his judicial discretion. The appeal from the decision of 16th March 1908 was within time and the Chief Court erred in holding it was barred by limitation. The right to apply for a review of an order of abatement given by section 371 of the Civil Procedure Code, 1882, exists whether such order is made under section 366 or section 368. Reference was made to *Suri Bhatta* v.

(1) (1888) P. R. No. 183.
(2) (1883) I. L. R. 5 All 591.
(3) (1897) I. L. R. 19 All. 348.
(4) (1867) B. L. R. Sup. Vol. 728; 7 Suth. W. R. 529.
(5) (1865) B. L. R. Sup. Vol. 349; 2 Suth. W. R. Mis. 85.
(6) (1888) I. L. R. 10 All. 587.

Sitarama Bhatta (1) and *Sham Singh* v. *Sant Singh* (2) in which there was nothing adverse to that holding. In any case having regard to the decision in *Karm Bakhsh* v. *Daulat Ram* (3), the Chief Court ought to have held that the appellant had "sufficient cause" for not presenting his appeal in time.

Zeffert, for the respondent A. A. Coates, contended that the appellant was admittedly out of time in presenting his appeal, and failed to satisfy the Chief Court that he had acted with due diligence, and had "sufficient cause" for getting an extension of time under section 5 of the Limitation Act. There was no ground for holding that the Chief Court did not exercise its discretion judicially. An Appellate Court will not interfere with the due exercise of judicial discretion: *Sharp* v. *Wakefield* (4). Reference was made to *Bhimrao Ramrao Desai* v. *Ayyappa Yellappa* (5) to show that that principle was applied in India. A mistake in law was not "sufficient cause" for an extension of time under section 5: *Ramjiwan Mal* v. *Chand Mal* (6), *In re Coles and Ravenshear* (7) and *Bechi* v. *Ahsanullah Khan* (8). The case of *Brij Mohan Das* v. *Mannu Bibi* (9) does not decide that a mistake in applying for a review *is* a "sufficient cause" for an extension of time, but only that it *may* be. Each case depends on its own facts, and there is no general rule laid down in India on the matter. The discretion, it was submitted, was rightly exercised. Reference was made to *Murugesa Mudaliar* v. *Jattaram Davy* (10) and *Sultan* v. *Ala Bakhsh* (11). Owing to the constant delay made by the

(1) (1883) I. L. R. 7 Mad. 195.
(2) (1885) P. R. No. 22.
(3) (1888) P. R. No. 183.
(4) [1891] A. C. 173.
(5) (1906) I. L. R. 31 Bom. 33.
(6) (1888) I. L. R. 10 All. 587.
(7) [1907] 1 K. B. 1.
(8) (1890) I. L. R. 12 All. 461.
(9) (1897) I. L. R. 19 All. 348.
(10) (1900) I. L. R. 23 Mad. 621, 625
(11) (1893) P. R. No. 45.

1917

BRIJ INDAR SINGH v. KANSHI RAM.

appellant in the prosecution of the suit, the Board should be disinclined to interfere in his favour with the discretion exercised by the Chief Court: *Ram Narain Joshi* v. *Parmeswar Narain Mahta* (1). There is, however, another point on which the judgment of the Chief Court may be upheld. The appeal to the Chief Court is governed by the Civil Procedure Code, 1908, which came into force in January 1909; *Chajmal Das* v. *Jagdamba Prasad* (2). In the new Code Order XXII, rule 4, is substituted for section 368 of the Code of 1882, and takes away the right of appeal, a plaintiff having to proceed under rule 9 of Order XXII. The appeal having been barred when the Code of 1908 came into force, the saving clause to rule 9 was not applicable. Order XLIII, rule 1 of the Code of 1908 was also referred to.

DeGruyther, K. C., (only called on to reply to the last point argued) contended that the appellant's right of appeal under the Code of 1882 was not taken away by the Code of 1908. The orders referred to in section 104 of the Code of 1908 were orders made under that Code only. Reference was made to Order XLIII, rule 1 (*k*). The delay attributed to the appellant was mainly due to the Chief Court declining to hear the application for leave to appeal.

July 19.

The judgment of their Lordships was delivered by LORD DUNEDIN. The facts out of which this case arises are very clearly and succinctly stated by Mr. Justice Johnstone in his judgment of the 6th April, 1909, which is part of the necessary history of the judgment actually before their Lordships. He says:—

"The history of this case is in brief as follows: In 1903 His Highness Raja Balbir Singh of Faridkot brought a suit under section 283, Civil

(1) (1902) I. L. R. 30 Calc. 309; (2) (1889) I. L. R. 11 All. 408, 412. L. R. 30 I. A. 20

Procedure Code (1882), against Kashi Ram and Joti Mal, decree-holders, Mr. G. H. Coates, judgment-debtor, and two others, for a declaration that certain property, attached under Kashi Ram and Joti Mal's decree, was plaintiff's property, and so not liable. Great delay took place and an application for transfer of the case was made to the Chief Court ; but a new District Judge having been ordered to Ferozpur, transfer became unnecessary. Again plaintiff applied for transfer of the case, and again the petition was rejected, and the case was taken up thereafter on the 21st April, 1904. In the course of the hearing on the 16th July, 1904, an application was made to the Chief Court to revise an order of the District Judge, directing a party to produce certain books. I need not go into details concerning this. Suffice it to say that the petition remained in the Chief Court till the 1st January, 1908, when Mr. Herbert, pleader for plaintiff, withdrew it, and that in the meantime certain casualties had occurred among the parties. In February 1906 Raja Balbir Singh died and was succeeded by the present Chief. On the 9th May, 1906, the latter applied in the Chief Court for substitution of his own name and this was ordered on the 19th May, 1906. Joti Mal, defendant 2, had also died on the 15th April, 1906, and plaintiff said he heard of this (plaintiff is a minor), on the 8th November of the same year. Application for substitution of his five sons was made on the 13th December, 1907, and, the file still being in the Chief Court, on the 11th January, 1908, the prayer was granted. These orders of the 19th May, 1906, and the 11th January, 1908, were apparently both *ex parte*.

"The papers went back from the Chief Court to the District Judge on the 13th March, 1908, and then an application was made to the District Judge on the 16th March, 1908, by Kashi Ram, defendant 1, and Lala Achhru Ram, one of the sons of Joti Mal, praying for an order of abatement on the grounds that in none of the following cases had representatives of deceased parties been put on the record within time, viz. :—

"1. Vice Raja Balbir Singh, died February 1906 ;

"2. Vice Joti Mal, died April 1906 ; and

"3. Vice Mr. G. H. Coates, died about December 1906.

"The new District Judge, Captain Sanford, without enquiry and without notice to plaintiff, the present Chief, and obviously without looking at the Chief Court's orders of the 19th May, 1906, and 11th January, 1908, summarily there and then ordered abatement, and gave applicants costs out of the deceased Raja's estates. The order was passed under both section 366 and section 368, Civil Procedure Code (1882), all three grounds set forth in the petition being accepted as sound.

"Upon a petition by the present Chief, Captain Sanford's successor on the 8th April, 1908, reconsidered the *ex parte* order of the 16th March,

1917

BRIJ INDAR SINGH v. KANSHI RAM.

1908, and set aside the order of abatement in so far as it depended upon the matter of the decease of the late Raja. This was an order under section 371, Civil Procedure Code, and was within the power of the District Judge. Then, on the 24th April, the District Judge took up the other two demises, and set aside the abatement order also in respect of them. On both occasions it was urged before the District Judge that section 371 did not authorise the reconsideration by him of an order under section 368, Civil Procedure Code, but he overruled the objection"

Having thus set forth the facts, the learned Judge expressed his opinion that though section 371 authorised the setting aside of the abatement in so far as it depended on a failure to substitute a new plaintiff under section 366, it did not do so, in so far as the abatement order depended on a failure to substitute a new defendant under section 368. Accordingly, holding the District Judge Prenter's order to review to be *ultra vires*, he quashed that order and restored the *ex parte* order of the District Judge Sanford which abated the suit.

It follows from what Mr. Justice Johnstone had said, that in his opinion the proper course for the plaintiff who, by an *ex parte* order in the District Court, had had his suit brought to an end, was to appeal to the Chief Court against that order. This the plaintiff did. But on presenting his appeal, he was met by the objection that it was time-barred. The case depended before the same Judge, Mr. Justice Johnstone. He upheld the objection. The case was then set down for review by the Chief Court. In that Court Mr. Justice Johnstone sat as sole Judge. He, after a careful reconsideration, not unnaturally repeated his former judgment, but gave leave to appeal to His Majesty in Council.

The sole question directly raised is whether the time which was spent in getting the District Judge Prenter's judgment, which was afterwards decided to be wrong and in getting it set aside, falls to be

deducted in calculating the time during which appeal was possible. This depends on section 5 of the Limitation Act, which is in these terms:—

"Any appeal or application for a review of judgment may be admitted after the period of limitation prescribed therefor, when the appellant or applicant satisfies the Court that he had some sufficient cause for not presenting the appeal or making the application within such period."

It is right, also, to quote section 14 of the same Act, which is as follows:—

"In computing the period of limitation prescribed for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or a Court of Appeal, against the defendant, shall be excluded, when the proceeding is founded upon the same cause of action, and is prosecuted in good faith in a Court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it."

This, it will be observed, does not in terms apply, as it deals with suits and not with appeals, but its relevance will be seen by the judgments afterwards quoted.

The learned Judge, Mr. Justice Johnstone, in his first deliverance on this matter, cited the case of *Ramjiwan Mal* v. *Chand Mal* (1). That case laid down the broad proposition that a mistake in law never could be the foundation for an application for the indulgence which may be granted under section 5. If that were sound there would be an end of the case. Upon the assumption that review was not the proper remedy for an abatement granted in respect of section 368 (which assumption the plaintiff by acquiescing in Mr. Justice Johnstone's judgment of the 6th April 1909, must be held to concede), the proceeding by way of review instead of by appeal was a mistake in law. But the learned Judge's attention does not seem to have been called to the fact that the case cited was really reversed by the decision of *Brij Mohan Das* v. *Mannu*

(1) (1888) I. L. R. 10 All. 587.

1917

BRIJ INDAR SINGH v. KANSHI RAM.

Bibi (1), where a Full Bench held that a mistake in law may be the foundation for the relief craved. The case on its facts is not directly in point here, for it was concerned with a suit and not with an appeal: *i.e.*, was directly under section 14; and further, the mistake made was clearly within the words "a Court which from defect of jurisdiction is unable to entertain it." In the second judgment the learned Judge carefully reconsidered the authorities. The case of *Karm Bakhsh* v. *Daulat Ram* (2) had been specially pressed upon his attention; a Full Bench decision of his own Court which, if applicable, he was bound to follow. He refused to consider it applicable, because, in his opinion, it laid down no general rule, and each case he considered depended on its own facts.

Their Lordships find it impossible to agree with the view that the case of *Karm Bakhsh* v. *Daulat Ram* (2) laid down no general rule. The case was first taken in chambers, when Plowden J., the point being raised, said "This class of cases is constantly cropping up, and some definite rule should be laid down." Following this view, when with another Judge he took up the case in the Divisional Court, he referred the matter to a Full Bench. The case was heard before a Full Bench, and Plowden J. delivered the judgment. It will be enough to cite two passages from that judgment. After setting forth the terms of section 5 of the Limitation Act, he says:—

"All that the section requires in express terms as a condition for the exercise of the discretionary power of admission of an appeal presented after time is sufficient cause for not presenting the appeal within the prescribed period. If such can be shown, the Court may in its discretion, which is of course a judicial and not an arbitrary discretion, admit the appeal. We think the true guide for a Court in the exercise of this discretion is whether the appellant has acted with reasonable diligence

(1) (1897) I. L. R. 19 All. 348. (2) (1888) P. R. No. 183, 478.

in prosecuting his appeal, and we think further that he ought ordinarily to be deemed to have acted with ordinary diligence, when the whole period between the date of the decree appealed against, and the date of presenting the appeal does not, after excluding the time spent in prosecuting with due diligence a proper application for review of judgment, exceed the period prescribed by law for presenting the appeal."

And again—

"We also agree with the High Court of Allahabad in the case of *Balwant Singh* v. *Gumani Ram* (1) that the circumstances contemplated in section 14 of the Limitation Act should ordinarily constitute a sufficient cause within the meaning of section 5."

These citations seem to show that there is a general rule expressed, and that the case was only sent to a Full Bench in order that some general rule should be laid down.

The learned Judge says that each case depends on its own circumstances. This is true. But he seems to treat this truism as if it was destructive of the idea that there can be a general rule. There is no inconsistency in the position. There may be a general rule as to the exercise of discretion, but each case must, nevertheless, be examined as to its own circumstances to see whether they make it fall within or without the terms of the general rule.

It would doubtless be within the power of this Board to hold that the general rule so laid down was wrong. But here it must be noticed that though as authority binding on Mr. Justice Johnstone it rests on the Punjab case, the authority for it is really much wider. The case of *In re Brojender Coomar Roy* (2) was also a Full Bench case, sent to the Full Bench of Calcutta in order to obtain a general rule, and it is well summarised in the head note which runs :—

"If a party presents an application for review of judgment within the ordinary period limited for appealing, the time occupied by the Court

(1) (1883) I. L. R. 5 All. 591.

(2) (1867) B. L. R. Sup. Vol. 728 ; 7 Suth. W. R. 529.

1917

BRIJ INDAR SINGH v. KANSHI RAM.

in disposing of such application will not be reckoned among the days limited for appealing, but will be added thereto, and a memorandum of appeal represented within such extended period will be received as presented within time."

And in delivering judgment, Peacock C. J. mentioned that they were upholding the ruling of fourteen Judges in 1865, and that the practice upheld had been the practice of Madras since 1860. Their Lordships were also informed that the same rule had been followed in Bombay. In Allahabad the same result is reached by combining the case of *Balwant Singh* v. *Gumani Ram* (1) with the case of *Brij Mohan Das* v. *Mannu Bibi* (2).

Now if the matter were entirely open, inasmuch as a mere mistake in law is not *per se* sufficient reason for asking the Court to exercise its discretion under section 5 (instances of which are given in some of the cases cited by the learned Judge), there would be a good deal to be said in argument in favour of making the rule universal, and upholding in its entirety the ruling given in the case of *Ramjiwan Mal* v. *Chand Mal* (3) above cited. But the matter is not open. To interfere with a rule, which after all is only a rule of procedure, which has been laid down as a general rule by Full Benches in all the Courts of India, and acted on for many years, would cause great inconvenience, and their Lordships do not propose so to interfere.

It was strenuously urged by the learned counsel for the respondents that inasmuch as the power in section 5 is admittedly a discretionary power, this Board ought not to interfere with the discretion exercised by Mr. Justice Johnstone, and he cited cases of which *Sharp* v. *Wakefield* (4) may be taken as a type.

(1) (1883) I. L. R. 5 All. 591.
(2) (1897) I. L. R. 19 All. 348.
(3) (1888) I. L. R. 10 All. 587.
(4) [1891] A. C. 173.

In reality, however, that case is against him. For it laid down that discretion there as here must be a judicial and not an arbitrary discretion. Now if the Judge who purports to exercise the discretion does so under the view that there is no general rule, when in fact there is one, if he has, to use an expression often used in another class of cases, misdirected himself as to the law to be applied to the case, he cannot exercise a judicial discretion, and the Superior Court —in this case this Board—must either remit the case or exercise the discretion themselves. In a case like *Sharp* v. *Wakefield* (1) there would necessarily be a remit. Here it is otherwise, for the general rule applies, and it only remains to see whether the proceedings in the review were reasonably prosecuted and in good faith. That they were so their Lordships have no doubt. The District Judge Sanford made the order for abatement on the 16th March, 1908. The plaintiff applied on the 20th March to set it aside, and it was set aside by the District Judge Prenter on the 24th April, 1908. Mr. Justice Johnstone speaks of the plaintiff "persisting" in prosecuting review after the defendants had taken the point that appeal and not review was the proper remedy. But the defendants were held by the District Judge Prenter to be wrong, and their Lordships think that the plaintiff cannot be held in any fair sense to have "persisted" in his attitude till Mr. Justice Johnstone's first judgment of the 6th April, 1909. Accepting that judgment, he appealed on the 21st April, 1909. The question of what he did in the fifteen days is neither here nor there. For, accepting the general rule as stated above, the period for appealing being ninety days, the dates stand thus: the District Judge Sanford's order was made on the 16th

(1) [1891] A. C. 173.

1917

BRIJ INDAR SINGH v. KANSHI RAM.

March 1908. That order was set aside on the 8th April 1908. Thus only twenty-three days out of the ninety had expired. That left forty-seven days. And after the proceedings for review terminated only fifteen days were consumed before the appeal was presented.

Though it is not in the appellant's mouth to say that Mr Justice Johnstone's first judgment, settling that review was incompetent, is wrong, he having acquiesced therein, still as the matter has been mooted and discussed, their Lordships think it better to say that in their view the District Judge Prenter's judgment on this point was right, and that of Mr. Justice Johnstone wrong. The point seems to their Lordships very clear. Section 365 provides for the substitution of a new plaintiff when the plaintiff has died, upon the application of the representative of the deceased plaintiff. Section 366 deals with the state of circumstances when no such application is made within a certain time. The defendant may either (i) have the suit abated; or (ii) get an order putting up a new plaintiff Section 368 deals in a similar manner with the case of the death of a defendant. Thus it will be noticed that abatement is a penalty which is only imposed on a failure of the plaintiff.

Then comes section 371. This primarily deals with what abatement involves: "No fresh suit shall be brought on the same cause of action." It is obvious that it is only a plaintiff that is hurt by this. Nothing could be better for a defendant. It is also obvious that an abatement is equally hurtful to the plaintiff whether granted in respect of a failure under section 366 or section 368. When section 371 goes on to say under what conditions the plaintiff can get rid of the abatement, it would be expected that it would deal with abatement, however procured. And the opening

words make it clear that it is so; "When a suit abates or is dismissed *under this chapter*." This chapter includes section 368 just as much as section 366. The learned Judge seems to think that an argument can be founded on the fact that in the appeal section 588, an appeal is given against orders pronounced under section 368 and the second paragraph of section 366, but none against those under the first paragraph of section 366. The reason is apparent. Section 371 which gave review was sufficient as to abatement so far as the plaintiff was concerned; but being a plaintiff's section only, it was unavailable to a defendant, and as already pointed out, a defendant as such never would want to complain of abatement. But in paragraph 2 of section 366 and in parts of section 368, there are other matters than abatement. Under section 366, paragraph 2, a defendant might bring about the introduction of a wrong plaintiff against the will of the right one; under section 368 a plaintiff might introduce a wrong defendant. To the persons so aggrieved there is given appeal.

Though they think that Mr. Justice Johnstone's judgment on this point is erroneous, there is one remark which he makes in his opinion with which their Lordships agree, and which they wish to approve and emphasise. He points out how the whole mischief has arisen from the fact that the District Judge Sanford's order abating the suit was pronounced *ex parte* without giving the opposite party the opportunity of appearing. An order abating the suit, looking to the terms of section 371 already quoted, may be said to be really tantamount to a judgment in favour of the defendant. To pronounce such a judgment *ex parte*, when no notice has been given to the opposite side to appear and contest the order, is much the same as to decide a suit against a

1917

BRIJ INDAR SINGH v. KANSHI RAM.

defendant who has not been cited to appear. The practice, if it is a practice, is quite indefensible.

Their Lordships think it better to say further, that if the defendant had been present, it is clear that no order of abatement ought to have been pronounced. The plaintiff as representative of the original plaintiff, and the defendant's representatives of Joti Lal, had been introduced in the Chief Court. No doubt that was only done in the course of an interlocutory application as to the production of books. But the introduction of a plaintiff or a defendant for one stage of a suit is an introduction for all stages, and the prayer, which seems to have been made *ob majorem cautelam*, by the plaintiff, in his application to the District Judge Prenter, under section 365, was superfluous and of no effect. Coates, the judgment-debtor, was only formally called, and the non-presence of his representatives would afford no ground for the abatement of the suit.

Their Lordships will therefore humbly advise His Majesty to allow this appeal, and to remit to the Chief Court to allow the appeal and to set aside the order of the District Judge Sanford, and to remit to the District Judge to proceed with the hearing of the case on the merits. The respondents will pay the appellant the costs of this appeal and in the Courts below the costs so far as the proceedings were directed to setting aside the order of Judge Sanford The general costs of the suit will abide the result on the merits.

Appeal allowed.

Solicitors for the appellant: *T. L. Wilson & Co.*

Solicitors for the respondent, A. A. Coates: *Lumley & Lumley.*

J. V. W.

APPEAL FROM ORIGINAL CIVIL.

Before Woodroffe and Mookerjee JJ.

RAMENDRA NATH ROY

v.

BRAJENDRA NATH DASS.*

1917

March 2.

Misjoinder—Parties—Appeal—Causes of action—Practice—Judgment—Civil Procedure Code (Act V of 1908). O. I, rr. 1 and 3; O. II, r. 3—Letters Patent, 1865, cl. 15.

An appeal lies, under the Letters Patent, from an order of the High Court on its Original Side, refusing to allow plaintiff to proceed in one suit against several defendants on the ground of misjoinder and giving him time to elect how he would proceed with his suit and which of the defendants he would retain on the record.

O. I, r. 1 and O. I, r. 3 of the Civil Procedure Code apply to questions of joinder of parties as also of causes of action.

Umabai v. *Bhau Balwant* (1) and *Jankibai* v. *Shrinivas Ganesh* (2) dissented from.

The plaintiff brought a suit against four sets of defendants for the recovery of certain documents of title and the goods covered thereby and in the alternative for damages. In his plaint he alleged that the goods in suit were his property, that the defendant No. 1 obtained from him the documents of title relating thereto by fraud and made them over to defendant No. 2; that defendant No. 2, knowing that defendant No. 1 had no title either to the documents or to the goods, wrongfully dealt with them and sold the goods to defendants Nos. 3 and 4; that defendants Nos. 3 and 4 wrongfully claimed to retain the goods and the documents of title; and, lastly, that one of the documents of title, viz., a railway receipt, was pledged by defendant No. 1 to defendant No. 5, though the goods covered by it were in the possession of defendant No. 3:—

Held, that the suit was not bad for misjoinder of parties and causes of action.

APPEAL by Ramendra Nath Roy, the plaintiff, from the judgment of Chitty J.

On the 21st December, 1913, Ramendra Nath Roy entered into three several contracts at Calcutta with

* Appeal from Original Civil, No. 9 of 1917, in Suit No. 97 of 1914.

(1) (1908) I. L. R. 34 Bom. 358. (2) (1913) I. L. R. 38 Bom. 120.

1917

RAMENDRA NATH ROY v. BRAJENDRA NATH DASS.

one Brajendra Nath Dass, whereby the latter agreed to purchase from the former 1,750 bales of jute, shipment by December, 1913, and to pay 90 per cent. of the value of the same on presentation of the bills of lading relating to the said goods and the remaining 10 per cent. in cash on delivery.

On the morning of the 29th December, 1913, B. N. Dass called on R. N. Roy and was presented by the latter with 10 bills of lading and railway receipts together with the bill for payment as stipulated. After some persuation B. N. Dass succeeded in obtaining possession of these documents promising to pay for the goods later, on the same day. B. N. Dass failed to pay the amount to R. N. Roy; but after various delays he paid Rs. 25,000 by a cheque in part payment and subsequently, made over two other cheques for the balance of the amount for the jute in question. The first cheque was duly paid by the Bank, but the latter two cheques were dishonoured by the Bank. R. N. Roy finding that B. N. Dass was in insolvent circumstances, caused the jute in question to be stopped in transit in respect of the portion that had not already been delivered. Prior to this, viz., on the 30th December, 1913, B. N. Dass had made over nine out of the said ten documents to H. D. Cartwright & Co., who, thereupon, sold the same partly to the Lansdowne Jute Mills Co., Ld., and partly to Birkmyre Bros., proprietors of the Hastings Jute Mills. One of the documents of title, viz., Railway receipt No. 9, in connection with the jute sold was pledged to and remained in possession of the Bengal National Bank, though the goods covered by it had been delivered to the Lansdowne Jute Mills. On the 22nd January, 1914, R. N. Roy instituted a suit for the recovery of the goods in question together with the documents of title relating to them and in the

alternative, for damages. He made B. N. Dass, H. D. Cartwright & Co., the Lansdowne Jute Mills Co., Ld., Birkmyre Bros. and the Bengal National Bank, Ld., defendants in the suit. In his plaint he alleged that the goods in suit were his property, that B. N. Dass had obtained from him the said goods together with the documents of title relating thereto by fraud and had fraudulently and in order to cheat the plaintiff made over all the said documents, other than railway receipt No. 9, to H. D. Cartwright & Co., that H. D. Cartwright & Co., having reason to believe that B. N. Dass had no title to the goods covered by the said nine documents, took them over and sold the goods to the Lansdowne Jute Mills Co., Ld., and to Birkmyre Bros., proprietors of the Hastings Jute Mills; that the two mills had no title to the said documents and wrongfully retained the same; and finally, that the Bengal National Bank, Ld., had wrongfully obtained possession of the said railway receipt No. 9 and wrongfully claimed to retain the same and to deal with the goods covered thereby.

On the 11th May, 1915, Birkmyre Bros. obtained an order from the Court adding the Delhi and London Bank, Ld., as parties defendant, the plaintiff having refused to make the said Bank a party on the ground that he had no claim against it. On the suit coming on for trial before Mr. Justice Chitty on the 5th February, 1917, the defendants, with the exception of B. N. Dass, who did not appear, took the objection that there was misjoinder of parties and of causes of action. The learned Judge held, that there was such a misjoinder and the plaintiff could not be allowed to proceed in the one suit against the defendants as they then stood upon the record and gave the plaintiff a fortnight's time to elect how he would proceed with the suit and which of the defendants he would retain upon the record. The plaintiff, thereupon, appealed.

1917

RAMENDRA NATH ROY v. BRAJENDRA NATH DASS.

Mr. B. L. Mitter, for the Bengal National Bank, Ld. and the Delhi and London Bank, Ld., defendants Nos. 5 and 6, took the preliminary objection that no appeal lay from the order of Mr. Justice Chitty, dated the 5th February, 1917. This order was merely an order for adjournment and the plaintiff was given liberty to elect in the meantime which defendant or defendants he would proceed against. There was no order that if the plaintiff failed to elect, the suit would stand dismissed. There was merely an indication of the learned Judge's opinion to that effect. If the plaintiff did not make his election within the time allowed him, any order that might be passed thereafter would be appealable. The plaintiff, therefore, was somewhat premature in filing this appeal, which must be dismissed as premature.

Mr. Langford James, for Cartwright & Co., defendants No. 2, adopted Mr. B. L. Mitter's contention.

Mr. C. C. Ghose (with him *Mr. D. C. Ghose*), for Birkmyre Bros., defendants No. 4, also adopted Mr. B. L. Mitter's contention.

Mr. P. L. Buckland (with him *Mr. F. S. R. Surita*) for the Lansdowne Jute Mills Co., Ld., defendants No. 3, also adopted Mr. B. L. Mitter's contention and referred to *Standard Discount Company* v. *Otard de la Grange* (1). Mr. Justice Chitty's order made in this suit was certainly not the last step to fix the status of the parties with respect to the matter in dispute, and did not affect such status in any way.

The Offg. Advocate-General (*Mr. B. C. Mitter*) (with him *Mr. S. R. Das* and *Mr. K. P. Basu*), for Ramendra Nath Roy, the plaintiff. Mr. Justice Chitty decided that this suit in its present form was bad for multifariousness and that it would not lie. He had no longer any right to decide the suit as presented to him

(1) (1877) 3 C. P. D. 67.

and his decision was a judgment affecting the status of the parties and was covered by the ruling in *The Justices of the Peace for Calcutta* v. *The Oriental Gas Company, Ld.* (1). See also *Mullick Kefait Hossein* v. *Sheo Pershad Singh* (2), *Subrahmania Ayyar* v. *King-Emperor* (3), *Hurrish Chunder Chowdhry* v. *Kalisundery Debi* (4), *Brij Coomaree* v. *Ramrick Dass* (5) and *Mathura Sundari Dasi* v. *Haran Chandra Saha* (6). An appeal, therefore, from this order would lie under cl. 15 of the Letters Patent.

Mr. B. L. Mitter, in reply. The order in this case was not the only form in which such an order could be drawn up: *Frankenburg* v. *Great Horseless Carriage Company* (7). The appellant ought to have waited until a further order was made after the adjournment.

[The Court overruled the preliminary objection.]

The Advocate-General. This suit was not bad for misjoinder of parties or causes of action. O. II of the Code referred to the frame of suits and r. 3. of that Order would not by itself justify the present suit being brought as framed. This rule must be read with O. I, r. 3, on which the appellant relied and the words "save as otherwise provided" in O. II, r. 3, enabled the reference to O. I, r. 3, being made. Mr. Justice Chitty in purporting to construe O. I, r. 3, followed *Smurthwaite* v. *Hannay* (8) and *Sadler* v. *The Great Western Railway Co.* (9) and held that rules 1 and 3 of that Order did not permit the appellant to bring his suit in its present form. Since the decision in *Smurthwaite* v. *Hannay* (8), the rule in England as regards the joinder

(1) (1872) 8 B. L. R. 433.
(2) (1896) I. L. R. 23 Calc. 821.
(3) (1901) I. L. R. 25 Mad. 61.
(4) (1882) I. L. R. 9 Calc. 482.
(5) (1901) 5 C. W. N. 781.
(6) (1915) I. L. R. 43 Calc 857.
(7) [1900] 1 Q. B. 504.
(8) [1894] A. C. 494.
(9) [1896] A. C. 450.

1917

RAMENDRA NATH ROY v. BRAJENDRA NATH DASS.

of plaintiffs was altered and made wider than the rule as regards the joinder of defendants. In the new rule, viz, O. XVI, r. 1, R. S. C., the words "any right to relief" was substituted for the words "right to any relief." This alteration made the right more extended in the case of joinder of plaintiffs than in that of defendants. In the Civil Procedure Code, 1908, the words used were "any right to relief" in the rules both for joinder of plaintiffs and of defendants, thereby giving the Indian Rule for joinder of defendants a much wider scope than the corresponding English rule, from which it was taken.

In interpreting the language of the Code, reference must be made to the English cases. The first case of importance after the change in the Rules was *The Universities of Oxford and Cambridge* v. *George Gill & Sons* (1). See also *Stroud* v. *Lawson* (2), *Bullock* v. *The London General Omnibus Co.* (3), *Markt & Co., Ld.* v. *Knight Steamship Co., Ld.* (4), *Compania Sansinena de Carnes Congeladas* v. *Houlder Bros. & Co., Ld.* (5), *Times Cold Storage Company* v. *Lowther & Blankley* (6) and *Drincqbier* v. *Wood* (7). O. XVI, R. S. C. which dealt with the validity of the constitution of a suit, would, therefore, apply to causes of action as well as to parties.

The appellant's cause of action arose out of the same series of transactions and there were common questions of law and facts involved against all the defendants. The evidence would be substantially the same in respect of each of them. The present case arose out of B. N. Dass' act in obtaining the goods fraudulently from the appellant and that was the root

(1) [1899] 1 Ch. 55.
(2) [1898] 2 Q. B. 44.
(3) [1907] 1 K. B. 264.
(4) [1910] 2 K. B. 1021.
(5) [1910] 2 K. B. 354.
(6) [1911] 2 K. B. 100.
(7) [1899] 1 Ch. 393.

of everybody's title. The appellant's right to relief existed severally against the mills, or alternatively against the Bank. There could not, therefore, be any inconvenience in a joint trial against all the defendants. Such a joint trial would avoid four separate trials with the same evidence in each. *Nundo Kumar Nasker* v. *Banomali Gayan* (1), *Ishan Chander Hazra* v. *Rameswar* (2) and *Umabai* v. *Vithal* (3) were referred to.

Mr. Justice Chitty made a distinction between cases on torts and cases on contracts. The Civil Procedure Code made no such distinction and O. I, r. 3 was applicable to both contracts and torts. In support of the contention that several defendants might be joined in an action arising out of a tort, *Bullock* v. *The London General Omnibus Company* (4), *Drincqbier* v. *Wood* (5), *Thomson* v. *London County Council* (6) and *Frakenburg* v. *Great Horseless Carriage Company* (7) were referred to.

Mr. B. L. Mitter (*Contra*). Although O. I, r. 1 and O. I, r. 3 were similar in terms, they must be construed on different principles. Where several defendants were joined as also several causes of action, such joinder caused embarrassment, but not so in the case of several plaintiffs. The principles in the two instances were different. O. I related only to parties and not to causes of action, and under r. 3 of that Order in the case of joint liability a suit could be brought against the defendants jointly or severally, and in the case of separate liability the several defendants could be joined, provided the cause of action arose out of the same transaction and there was a

(1) (1902) I. L. R. 29 Calc. 871.
(2) (1897) I. L. R. 24 Calc. 831.
(3) (1908) I. L. R. 33 Bom 293.
(4) [1907] 1 K. B 264.
(5) [1899] 1 Ch. 393.
(6) [1899] 1 Q. B. 840.
(7) [1900] 1 Q. B. 504.

1917

RAMENDRA NATH ROY v. BRAJENDRA NATH DASS.

common question of law or fact involved. O. I, r. 3 contemplated in every case the possibility of separate suits. Therefore, O. I, r. 3 could not refer to joint torts. O. II, r. 3 undoubtedly dealt with causes of action and was the only rule under which several causes of action could be united in one suit, provided there was no prohibition. If O. I, r. 3 dealt with both joinder of parties and causes of action, O. II, r. 3 would be redundant and there would have been no necessity for its enactment. On the contrary, the restrictive words in O. II, r. 3 controlled O. I, r. 3. The English rule corresponding to O. I, r. 3 of the Code was contained in O. XVI, r. 4, R. S. C. The English rule, however, was much wider than our rule and there was no restriction placed on it. The English rule applied not only to joinder of parties, but also to joinder of causes of action.

In construing the wording of the Indian Code the construction put on the corresponding English rules must be looked to. *Sadler* v. *The Great Western Railway Company* (1), which was good law, and *Thompson* v. *The London County Council* (2) were relied on; but not *Smurthwaite* v. *Hannay* (3). Furthermore, the facts of the present case were not such as would bring it within the meaning of O. I, r. 3. In the present case there were, *firstly*, B. N. Dass' fraud with regard to nine documents of title, the dealings in respect of them by Cartwright & Co. with knowledge of the fraud and the possession of them by the Mills, and, *secondly*, B. N. Dass' fraud with regard to one document of title and the possession of it by the Bengal National Bank. There were, therefore, in this suit two different sets of transactions, two different sets of facts, two different sets of law, two differen

(1) [1896] A. C. 450. (2) [1899] 1 Q. B. 840.
(3) [1894] A. C. 494.

sets of issues and two different sets of evidence. There was no fact, with the exception of B. N. Dass' fraud, common between the Bengal National Bank and the other co-defendants. The only question with which the Bengal National Bank was concerned, was whether the pledge of the one document of title to it was a valid pledge. The substantial issue was not common and before the appellant brought his suit he ought to have seen that his right to relief arose against all the defendants from the same transaction and that there was a substantial, and not merely a small insignificant question of law or fact in common between the several defendants. The plaint, as framed, alleged different torts against different defendants. This was bad for misjoinder: *see* Dicey on Parties, page 431. *Gower* v. *Couldridge* (1), *Thompson* v. *The London County Council* (2), *Greenwood* v. *Greenwood* (3), *Umabai* v. *Bhau Balwant* (4), and *Jankibai* v. *Shrinivas Ganesh Valshankar* (5) were relied on. There must have been one *injuria* before several defendants could be united in one suit and the test was not the damage done to the plaintiff, but the wrong done by the defendants. All the English cases went on the ground of one *injuria*. *Frankenburg* v. *Great Horseless Carriage Company* (6), *Compania Sansinena de Carnes Congeladas* v. *Houlder Bros. & Co., Ld.* (7) and *Bullock* v. *The London General Omnibus Company* (8) were distinguishable. The Bengal National Bank, therefore, could not be joined as defendant in this suit. If this suit had been brought against B. N. Dass and the Bengal National Bank, it would have been properly constituted; but

(1) [1898] 1 Q. B. 348.
(2) [1899] 1 Q. B. 840.
(3) (1908) 100 L. T. 68.
(4) (1908) I. L. R. 34 Bom. 358.
(5) (1913) I. L. R. 38 Bom. 120.
(6) [1900] 1 Q. B. 504.
(7) [1910] 2 K. B. 354.
(8) [1907] 1 K. B. 264.

1917

RAMENDRA NATH ROY v. BRAJENDRA NATH DASS.

the joinder of the transactions of Cartwright & Co., in which the Bengal National Bank had no interest whatsoever, made the suit bad for misjoinder and the plaintiff's suit could not be brought in its present form as provided by O. II, r. 3. With regard to *Nundo Kumar Nasker* v. *Banomali Gayan* (1) and *Umabai* v. *Vithal* (2), these cases were decided under the old Code and could not be reconciled with *Mullick Kefait Hossein* v. *Sheo Pershad Singh*(3) and *Sarala Sundari Dasi* v. *Sarada Prosad Sur* (4), unless a distinction was made between cases of recovery of land and cases arising out of tort.

Mr. Langford James did not object to the suit as it was framed so long as the defendants, Cartwright & Co., were safeguarded against the allegations that B. N. Dass and Cartwright & Co., fraudulently cheated the appellant. He did, however, object to the suit being contested in its present form on different torts and in such a case would adopt the argument of Mr. B. L. Mitter.

Mr. P. L. Buckland. The case made against the Lansdowne Jute Mills Co., Ld., was not such as to enable them to be sued jointly with the other defendants. These Mills were not affected by the question whether or not there was any fraud, and was in no way concerned by that fraud. There was in fact no common question of law or fact between these Mills and the other defendants. *Compania Sansinena de Carnes Congeladas* v. *Houlder Bros. & Co., Ld.* (5) was relied on and the argument of Mr. B. L. Mitter on the general propositions of law was adopted.

Mr. C. C. Ghose. It was conceded by the Advocate General that O. II, r. 3 taken by itself did not help

(1) (1902) I. L. R, 29 Calc. 871.
(2) (1908) I. L. R. 33 Bom. 293.
(3) (1896) I. L. R. 23 Calc. 821.
(4) (1904) 2 C. L. J. 602.
(5) [1910] 2 K. B. 354.

the appellant and must be read with O. I, r. 3. It, in fact, controlled O. I, r. 3: see *Narsingh Das* v. *Mangal Dubey* (1), and Woodroffe's Civil Procedure Code, 2nd edn., pp. 606 and 607. O.II, r. 3 related only to joinder of causes of action: see *Umabai* v. *Bhau Balwant* (2) and *Jankibai* v. *Shrinivas Ganesh Valshankar* (3). There was no community of interest raised between Birkmyre Bros. and the other defendants and the tortious acts in this case were all independent from each other.

The Advocate-General, in reply.

Cur. adv. vult.

WOODROFFE J. This suit is brought against four sets of defendants and the point in issue is, whether there has been misjoinder of parties and causes of action. In the judgment under appeal, Chitty J. has held that the plaintiff who claims such right cannot be allowed to proceed in one suit against the defendants and, adjourning the hearing, gave the plaintiff a fortnight to elect against which of the defendants he would proceed. Though the learned Judge does not expressly say so, it is quite clear on the judgment and proceedings that if the plaintiff does not elect and persists in his claim to sue all defendants, his suit will be dismissed The position is substantially the same as if the Court had dismissed the action unless the plaintiff elected under the liberty given to him. It has been objected that no appeal lies. The first question is whether this is a judgment. It seems to me that it is, for it is an adjudication that the suit cannot lie as framed and cannot proceed as presented and that the Court cannot hear it. Such adjudication was based on the view that the suit is bad for misjoinder

(1) (1882) I. L. R. 5 All. 163. (2) (1908) I. L. R. 34 Bom. 358.
(3) (1913) I. L. R. 38 Bom. 120.

1917

RAMENDRA NATH ROY v. BRAJENDRA NATH DASS.

WOODROFFE J.

of causes of action and parties. The Court is said to be unable to entertain the suit, the reason being of a like nature with defect of jurisdiction and not a mere irregularity. A decision to this effect will be followed by dismissal unless the plaintiff abandons rights to which under the law he claims to be entitled. It is, in my opinion, a judgment affecting the merits of the question and determining some right or liability between the parties. It has not been contested that if there were a final order having this effect, it would be a judgment. The argument is that there is no such order, that all the Courts has done is to adjourn the suit, that it has not directed an election or dismissed the suit, and that, therefore, the appeal is premature.

We must look at the substance of the matter. The order giving the plaintiff liberty to elect, a liberty he did not desire and an order which he opposes, is nothing but an adjudication that he cannot proceed on the plaint as framed, and such an adjudication necessarily implies the result which follows on persisting with such a suit, namely, dismissal. The judgment makes clear why the plaintiff was called upon to elect. There appears to me to be in substance a decision that the suit will not lie as framed with the result that if the plaintiff insists on his alleged rights, the suit will be dismissed. I am of opinion that on these facts an appeal will lie.

On the merits the question is this. The frame of the suit is admittedly not supported by Order II, rule 3. It is then said that it is justified by Order I, rule 3. To this it is replied, firstly, that this last rule deals with parties and not joinder of causes of action, and in the alternative and on the supposition that it does deal with joinder of causes of action, the present case does not on the facts fall within the rule. Order I is headed "parties" and Order II

"frame of suit." The question of parties involves that of cause of action and *vice versa*. A person is made a party because there is a cause of action against him; and where causes of action are joined, parties are joined. In a perfectly framed Code which dealt in separate chapters with parties and causes of action, the provisions should be exactly parallel, looking at the same matter from its different aspects in a way according to which the provisions of one Order would be in conformity with the provisions of the other. So much may be conceded, and if the solution of the question were doubtful, one might have hesitated on this ground to hold that a suit might be framed under Order I in a manner not provided for by Order II, which, according to its heading, specifically deals with the frame of a suit. But in the present case we have to deal with the wording of a rule, the meaning of which has been construed. There are decisions of the English Courts on rules from which our own are taken. These decisions are subsequent to the year 1896, when Order XVI, r. 1 was amended. It has been held that that Order deals not only with joinder of parties, but also joinder of causes of action, notwithstanding that Order XVI like Order I is headed parties only [*Compania Sansinena deCarnes Congeladas* v. *Houlder Bros. & Co., Ltd.* (1), *Bullock* v. *The London General Omnibus Co.* (2), *Markt & Co., Ltd.* v. *Knight Steamship Co. Ltd.* (3) and *Times Cold Storage Co.* v. *Lowther and Blankley* (4)].

This, notwithstanding incidental observations to a contrary effect in *Thompson* v. *The London County Council* (5), is not disputed before us. The decisions in the Bombay High Court given in 1908 and referred to

(1) [1910] 2 K. B. 354.
(2) [1907] 1 K. B. 264, 271, 272.
(3) [1919] 2 K. B. 1021, 1036.
(4) [1911] 2 K. B. 100, 107.
(5) [1899] 1 Q. B. 840, 842.

1917

RAMENDRA NATH ROY v. BRAJENDRA NATH DASS.

WOODROFFE J.

in *Jankibai* v. *Shrinivas Ganesh* (1) do not refer to the latest English decisions. It is conceded before us that it cannot be now contended that Order XVI from which Order I is taken, does not refer to joinder of causes of action. These decisions were on Order XVI, rule I, corresponding to Order I, rule 1, but are equally applicable to Order I, rule 3 which is in exactly the same terms as Order I, rule 1 substituting the word "defendant" for "plaintiff." Indeed, in England where the rule relating to the joinder of defendants is in differing terms from that relating to joinder of plaintiffs it has been held that they should be interpreted on similar principles. It must be held then that Order I, rule 3, does refer to joinder of causes of action. The next question then is whether the joinder in the present case is justified by that rule. It is contended that it is not, it being argued that there are different sets of transactions and no common question of law or fact. The foundation of the case, on which the rest of it depends, is the alleged fraud of B. N. Dass. If such fraud is proved the question is, did the defendants who all claim under B. N. Dass obtain any title ? If the plaintiff fails to prove fraud on the part of B. N. Dass, the case fails against all the defendants. If he proves fraud, it may be that the defendants may have a different answer by way of defence ; but that does not make the case any the less one of a common question of law and fact. The same act or transaction which concerns all parties is the alleged fraud of B. N. Dass, and this involves a common question of law or fact. All defendants have derived title from a person who is alleged to have obtained the goods by means of fraud. By reason of this the possession of all is alleged to be wrongful. Whether a common question arises may be tested by seeing what the

(1) (1913) I. L. R, 38 Bom. 120.

evidence will be. In the shorthand notes Chitty J. expressed the opinion that the evidence will be common, and that if there were separate suits, they might be heard together with consent. In the judgment the learned Judge qualified this statement by saying that this was true up to a point. It is true so far as the plaintiff's cause of action, as based on the fraud of B. N. Dass, is concerned, though there may be some facts which are particular to particular parties being offered in proof of the plaintiff's case (*e.g.*, present possession of the goods as a result of such fraud) or by the defendants as part of their defence. The rule does not say that all questions must be common. It is sufficient that there is a common question. In my opinion, then, the plaint is within the provisions of Order I, rule 3. It may be conceded that the case of the Bengal National Bank raises points which do not affect other defendants. For the Bank is not concerned with the transactions with Cartwright & Co. or the two mills which claim through them. Goods covered by railway receipt No. 9 have not been stopped in transit, having been already delivered to the Lansdowne Mill. The plaint asks for declaration that the plaintiff is entitled to the document (Railway receipt No. 9) and to the goods covered thereby which are said now to be with the Lansdowne Mill. The Bank claims to deal with the goods if it can do so. The common root of title is B. N. Dass.

I am of opinion, therefore, that the suit is not bad for misjoinder of parties and causes of action. Should it, however, be convenient, the Court may [*Umabai* v. *Vithal* (1)] direct the successive trial of the issues separately affecting different defendants. Thus the question of the alleged fraud of B. N. Dass touching all the defendants may be tried first. If it fails, there is

(1) (1908) I. L. R. 33 Bom. 293, 306.

1917

RAMENDRA NATH ROY v. BRAJENDRA NATH DASS.

WOODROFFE J.

an end of the case. If it succeeds and the Bengal National Bank does not wish to be present at the trial of the issues, so far as they affect the other defendants viz., Cartwright & Co. and those claiming through them, there is no reason why it should attend. I would, therefore, decree this appeal with costs.

MOOKERJEE J. This appeal is directed against a determination by Mr. Justice Chitty that there has been a misjoinder of causes of action in this suit and that the plaintiff cannot be allowed to proceed against the defendants as they at present stand on the record. A preliminary objection has been taken to the competence of the appeal on the ground that this decision does not constitute a "judgment" within the meaning of clause 15 of the Letters Patent. Stress has been laid on the circumstance that the order as drawn up merely adjourns the suit to a specified date with liberty to the plaintiff to elect meanwhile as against which of the defendants he will prosecute the suit and does not specifically state, as the order of Channell J. did, in the case of *Frankenburg* v. *Great Horseless Carriage Co.* (1) that, on his failure to elect the suit will be dismissed. In my opinion, there is no substance in the preliminary objection.

It is plain that the true test to be applied in the solution of the question of the competence of the appeal is, not the form of the adjudication but its real effect on the suit or proceeding in which it has been made. Whatever the form of the adjudication may be, there is no doubt that it does, in the present instance, put an end to the suit, so far as the trial Court is concerned; from this standpoint, the adjudication may properly be deemed a judgment, not merely within the test formulated by White C. J. in *Tuljaram Row* v. *Alagappa Chettiar* (2) but, also within the

(1) [1900] 1 Q. B. 504. (2) (1910) I. L. R. 35 Mad. 1.

definition given by Couch C. J. in *The Justices of the Peace for Calcutta* v. *The Oriental Gas Co., Ld.* (1): "Judgement in clause 15 means a decision which affects the merits of the question between the parties by determining some right or liability". That this does not necessarily involve an actual decision on the right in controversy between the parties, is clear from one of the illustrations given by Couch, C. J., himself. He pointed out the obvious difference between an order for the admission of a plaint and an order for its rejection, and added the observation that "the former determines nothing, but is merely the first step towards putting the case in a shape for determination; the latter determines finally, so far as the Court which makes the order is concerned, that the suit as brought will not lie; the decision therefore is a judgement in the proper sense of the term." The same view is confirmed by the decision of Couch C. J. in *Hadjee Ismail Hadjee Hubbeeb* v. *Hadjee Mahomed Hadjee Joosub* (2), where he held that an appeal lies from an order refusing to set aside an order granting leave to a plaintiff to sue under clause 12 of the Letters Patent. The order, he said, was of great importance to the parties, was not a mere formal order or an order merely regulating the procedure in the suit, but one that had the effect of giving a jurisdiction to the Court which it otherwise would not have; it might fairly be said to determine some right between the parties, namely, the right to sue in a particular Court. To the same effect is the decision of the Judicial Committee in *Hurrish Chunder Chowdhry* v. *Kalisunderi Debi* (3), that an appeal lies against an order which, in substance, decides a question of jurisdiction. Now when a Court refuses to proceed with the trial of a suit

(1) (1872) 8 B. L. R. 433.

(2) (1874) 13 B. L. R. 91.

(3) (1882) I. L. R. 9 Calc. 482; L. R. 10 I. A. 4.

1917

RAMENDRA NATH ROY v. BRAJENDRA NATH DASS.

MOOKERJEE J.

on the ground of misjoinder of parties and causes of action, the Court may fairly be said, in the words of Beverley and Jenkins JJ., in *Mullick Kefait Hossein* v. *Sheo Pershad Singh* (1), to be unable to entertain the suit, and the reason is of a like nature with defect of jurisdiction. As pointed out by Lord Herschell and Lord Russell in *Smurthwaite* v. *Hannay*(2) and by Lord Halsbury in *Subrahmania Ayyar* v *King-Emperor* (3), an objection that a suit is multifarious is really an objection that the suit has been constituted as to joinder of parties and causes of action, in a way not authorised by the law and the rules applicable to procedure. The decision that a suit is so constituted and cannot be entertained as framed, is, in my opinion, a judgment within the meaning of the Letters Patent. It may further be usefully borne in mind that, as was pointed out in *Mathura Sundari Dasi* v. *Haran Chandra Saha* (4) and *Budhu Lal* v. *Chattu Gope* (5), the various definitions or elucidations of the term "judgment" to be found in a variety of cases in the reports, are not statutory definitions, and, while they furnish useful tests, they cannot be deemed inflexible and exhaustive. In the present case, if we look at the nature and contents of the order, there is no escape from the conclusion that it would be idle to hold that the plaintiff should refuse to elect, should get his suit dismissed, and, then, prefer an appeal against the decree of dismissal as he would be unquestionably entitled to do. I am not disposed to place a narrow construction upon the term "judgment" and thereby to postpone the inevitable determination by the Court of Appeal, of the controversy as to the constitution of the suit. The

(1) (1896) I. L. R. 23 Calc. 821.
(2) [1894] A. C. 494.
(3) (1901) I. L. R. 25 Mad. 61; L. R. 28 I. A. 257.
(4) (1915) I. L. R. 43 Calc. 857.
(5) (1916) I. L. R. 44 Calc. 804; 21 C. W. N. 269.

preliminary objection must, consequently, be overruled.

The determination of the question whether or not the suit as framed is open to objection on the ground of misjoinder of parties and causes of action depends upon the allegations made in the plaint. The suit is framed in the alternative for the recovery of goods and documents of title relating thereto or of the value of the goods. The plaintiff asserts that the bales of jute in controversy were his property and that Brajendra Nath Dass by means of fraud obtained possession thereof with the documents of title. The plaintiff further asserts that the goods have subsequently passed into the possession of the Lansdowne Jute Mills and the Hastings Jute Mills through Cartwright & Co. to whom they were transferred by Brajendra Nath Dass. The plaintiff next alleges that one of the documents of title, namely, a railway receipt has passed from Brajendra Nath Dass to the Bengal National Bank, though the goods covered thereby are in the possession of the Lansdowne Jute Mills. On these allegations, the plaintiff joined as defendants Brajendra Nath Dass, Cartwright & Co., the Lansdowne Jute Mills, the Hastings Jute Mills and the Bengal National Bank. The relief he seeks is the recovery of the goods and the documents of title, or, in the alternative, the value of the goods. As regards the alternative claim, he seeks a decree for the entire sum against Brajendra Nath Dass and Cartwright & Co., or proportionate sums against the other three defendants according to the value of the goods and documents in the possession of each of them. Before the trial of the suit, the Delhi and London Bank were added as defendants on the application of the Hastings Jute Mills, on the ground that they were interested in the subject-matter of the litigation.

1917

RAMENDRA NATH ROY v. BRAJENDRA NATH DASS.

MOOKERJEE J.

Mr. Justice Chitty has held that the suit cannot proceed on the plaint as framed, because not framed in conformity with Order II, rule 3 of the Civil Procedure Code, 1908. He has further held that the plaintiff could not successfully claim the benefit of Order I, rule 3. His view in substance is that Order I, rule 3 is limited to joinder of parties and has no application to questions of joinder of causes of action, which must be deemed to be governed exclusively by Order II, rule 3. For the solution of this, the fundamental question in this appeal, it is necessary to examine the provisions of Orders I and II.

Order I relates to parties to suits, Order II relates to frame of suits. Consequently, at first sight, it might seem as if the two orders related to two distinct topics. Such a view, however, would obviously be based upon an unsubstantial distinction, because when a plaintiff frames his suit, he joins parties as defendants, ordinarily because he claims to have a cause of action against them; in other words, when the legislator has to frame rules for joinder of parties and joinder of causes of action, he examines, on the two occasions, the same problem though from different standpoints. Accordingly, in a Code which is ideally arranged with due regard to logic and symmetry, one would expect to find in the chapter on joinder of causes of action provisions which accurately correspond to similar provisions in the chapter on joinder of parties. Codes, however, are rarely, if ever, accurately logical and symmetrical. It would, consequently, be unsafe to assume that because a particular rule finds a place in Order I, which treats of parties to suits, it can have no bearing on questions of misjoinder of causes of action; it is manifestly necessary that some regard, at any rate, must be paid to the history of the legislation on the subject: *Maharajah Ishuree Persad Narain*

Singh v. *Lal Chutterput Singh* (1), *Brown* v. *McLachlan* (2) and *Kripa Sindhu Mukerjee* v. *Annada Sundari Debi* (3). Now it is well known that Order I, rule 1, is a reproduction of Order XVI, rule 1 of the Rules of the Supreme Court in England, while Order I, rule 3, which corresponds to R. S. C., Order XVI, rule 4 is yet substantially different in phraseology therefrom. Order II, rule 3, again corresponds to R. S. C. Order XVIII, rule 1, but differs therefrom in an important respect. Thus, as Order I, rule 1, which provides for the joinder of plaintiffs is identical with R. S. C. Order XVI, rule 1, it is consonant to well established principles of statutory interpretation that we should determine the exact scope of the rule in our Code in the light of the decisions in the Superior Courts in England which have explained the true construction of R. S. C., Order XVI, rule 1. As White C. J. observed in *Lovelock & Lewes* v. *Malabar Timber and Saw Mills* (4), in considering the construction of a section in an Indian Act which is professedly based on an English enactment, which in fact reproduces almost word for word the language of the English enactment, we are in practice, if not in theory, bound by the decisions of the English Court of Appeal. Now, it is well-known that the English rule, as it now stands, was introduced on the 26th October, 1896, to meet the difficulty created by the decision of the House of Lords in *Smurthwaite* v. *Hannay* (5) to the effect that the rule as it previously stood did not relate to joinder of causes of action, but applied only to joinder of parties in respect of the same cause of action. The scope of the rule was greatly

(1) (1842) 3 Moo. P. C. 100, 130.
(2) (1872) L. R. 4 P. C. 543, 550.
(3) (1907) I. L. R. 35 Calc. 34; 6 C. L. J. 273, 293.
(4) (1913) 13 Mad. L. T. 282.
(5) [1894] A. C. 494.

1917

RAMENDRA NATH ROY v. BRAJENDRA NATH DASS.

MOOKERJEE J.

extended by alteration, and it can no longer be said that the order relates only to joinder of parties and not to joinder of causes of action. Reference may, in this connection, be made to the judgment of Bowen L. J. in *Hannay & Co.*, v. *Smurthwaite* (1), which emphasises the distinction between the expression "right to any relief" which was used in the old rule and the phrase "any right to relief" which is used in the rule now in force. The history of this alteration is explained in the case of *The Universities of Oxford and Cambridge* v. *George Gill & Sons* (2), which followed the decision in *Stroud* v. *Lawson* (3). That the altered rule covers joinder of parties as also causes of action must now be treated as indisputable in view of the decisions in *Bullock* v. *The London General Omnibus Co.* (4), *Compania Sansinena de Carnes Congeladas* v. *Houlder Bros & Co., Ld.* (5), *Markt & Co.* v. *Knight Steamship Co., Ld.* (6) and *Times Cold Storage Co.* v. *Lowther and Blankley*(7). It is further worthy of note that although the phraseology of R. S. C., O. XVI, r. 3, which relates to joinder of defendants, has not been altered, its scope has recently been deemed to have been enlarged by reason of the alteration effected in R. S. C., O. XVI, r. 1, which treats of joinder of plaintiffs: *Compania Sansinena de Carnes Congeladas* v. *Houlder Bros. Co., Ld.* (5). Consequently, as under our Code, the rules relating to the joinder of defendants has been framed on the same lines as the altered rule relating to the joinder of plaintiffs (O. I, rr. 1 and 3), there is even much stronger reason here than in England to hold that O. I, r. 3 applies to questions of joinder of parties

(1) [1893] 2 Q. B. 412.
(2) [1899] 1 Ch. 55.
(3) [1898] 2 Q. B. 44.
(4) [1907] 1 K. B. 264.
(5) [1910] 2 K. B. 354.
(6) [1910] 2 K. B. 1021.
(7) [1911] 2 K. B. 100.

as also joinder of causes of action. I do not feel pressed by the phrase "save as otherwise provided" which occurs in O. II, r. 3 (*1*). I am not prepared to read into this rule the words "in this order" after "provided," specially in view of the language used in R. S. C., O. XVIII, r. 1, whereon our rule is based. Nor do I feel embarrassed by the decision in *Thompson* v. *The London County Council* (1), *Munday* v. *South Metropolitan Electric Light Co., Ld.* (2) and *Greenwood* v. *Greenwood* (3), which do not militate against the view that R. S. C., O. XVI, rr. 1 and 3 relate to misjoinder of parties as also causes of action. The decision in *Thompson* v. *The London County Council* (1), overlooks the cases of *Stroud* v. *Lawson* (4) and *The Universities of Oxford and Cambridge* v. *George Gill & Sons* (5), as explained in *Frankenburg* v. *Great Horseless Carriage Co.* (6) and *Compania Sansinena de Carnes Congeladas* v. *Houlder Bros. & Co., Ld.* (7). The case is an authority only for this principle: if you have suffered a wrong, it may be that A is the person who has committed it, in which case he is liable, but, perhaps, you are not certain that it may not be B who has committed it, and, if so, B is liable; as between A and B, they are strangers to each other in the matter, and, then, because you cannot ascertain whether A or B committed the wrong, you cannot bring the action for damages against A and B jointly. The two other decisions mentioned are clearly distinguishable on their special facts. Similarly, *Gower* v. *Couldridge* (8) which followed *Sadler* v. *The Great Western Railway Co.* (9) and was explained in *Frankenburg* v. *Great Horseless Carriage Co.* (6), only

(1) [1899] 1 Q. B. 840.
(2) 1913) 29 T. L. R. 346.
(3) (1908) 100 L. T. 68.
(4) [1898] 2 Q. B. 44.
(5) [1899] 1 Ch. 55.
(6) [1900] 1 Q. B. 504.
(7) [1910] 2 K. B. 354.
(8) [1898] 1 Q. B. 348.
(9) [1896] A. C. 450.

1917

RAMENDRA NATH ROY v. BRAJENDRA NATH DASS.

MOOKERJEE J.

illustrate the principle that if you have a cause of action against A and B for a tort X, and quite a separate cause of action against B for tort Y, you cannot in one action unite claims in respect of both torts X and Y against A and B. Reliance has been placed on behalf of the respondents on the decision of the House of Lords in *Sadler* v. *The Great Western Railway Co.* (1), which was applied in *Gower* v. *Couldridge* (2), and of the Court of Appeal in in *Stroud* v. *Lawson* (3); but neither case lends support to the theory that R. S. C. O. XVI is restricted to joinder of parties and throws no light on questions of joinder of causes of action. The matter is one essentially of substance and not of form, as Romer L. J. observed in *Frankenburg* v. *Great Horseless Carriage Co.* (4), and I am not prepared to put a narrow construction upon the provisions of O. I. On the one hand, we have the fundamental principle that needless multiplicity of suits should be avoided; on the other hand, we have the equally essential principle that the trial of the suit should not be embarrassed by the simultaneous investigation of totally unconnected controversies. The Legislature has effected a compromise of these two principles by means of the rules embodied in Orders I and II which may possibly overlap to some extent in their application to concrete cases. It is not the function of the Court, however, to determine how far the rules are appropriate; we are bound to interpret them in their natural sense and apply them to the circumstances of each case. I hold, accordingly, that O. I, r. 1 and O. I, r. 3 apply to questions of joinder of parties as also of causes of action, and I respectfully dissent from the contrary view adopted by Davar J. in *Umabai* v.

(1) [1896] A. C. 450.
(2) [1898] 1 Q. B. 348.
(3) [1898] 2 Q. B. 44.
(4) [1900] 1 Q. B. 504.

Bhau Balwant (1) and *Jankibai* v. *Shrinivas Ganesh* (2), without examination of or reference to the later decisions in England as to the scope and meaning of the corresponding rules in that system.

The question next arises, whether the present suit has been constituted in conformity with O. I, r. 3. The determining factors applicable here are, first, could the right to relief against the defendants be said to be *in respect of* or *arising out of* (expressions obviously of wider import than *relating to*) the same act or transaction, and, secondly, would any common question of law or fact arise, if separate suits were brought. As regards the first test, there can in my opinion be no doubt that the right to relief against each of the defendants is based upon the same act, namely, the alleged fraud of Brajendra Nath Dass, and this is so notwithstanding the fact that there may have been subsequent acts or transactions in which the different defendants are individually concerned and which may enable them to raise distinct defences. As regards the second test, it is clear that if different suits were instituted, at least one common question of fact would arise, namely, the exact nature of the act imputed to Brajendra Nath Dass, which would have to be investigated, presumably on the same evidence separately adduced in several suits. Here, again, it is important to observe that the Code does not require that all the questions of law or fact which arise should be common to all the parties. The contention of the respondents was, in fact, based upon two fallacious assumptions, namely, first, that the rules require that each of the defendants should have been concerned in all the transactions, and, secondly, that, if different suits were brought, no question would arise in which all the defendants were not

(1) (1908) I. L. R. 34 Bom. 358. (2) (1913) I. L. R. 38 Bom. 120.

1917

RAMENDRA NATH ROY v. BRAJENDRA NATH DASS.

MOOKERJEE J.

interested. There is clearly no foundation whatever for either of these assumptions [cf. *Drincqbier* v. *Wood* (1)]. There is further no basis for the hypothesis put forward at one stage on behalf of the defendants, that questions of joinder of parties and causes of action are governed by different principles, according as the claim is founded on breach of contract or on tort; as Collins M. R. observed in *Bullock* v. *The London General Omnibus Company* (2), there is no reason for such a distinction. In my opinion, the case before us is completely covered by Order I, rule 3. I may add that the underlying principle of this conclusion is in exact conformity with what has been the recognised rule in this Court in two well-known classes of cases, namely, *first*, suits by reversioners for recovery of the estate of the last full owner alienated by a limited or a qualified owner during her period of possession and enjoyment, and, *secondly*, suits for possession by the real owner against holders under derivative titles from a trespasser as the common source. The decision in *Ishan Chunder Hazra* v. *Rameswar Mondol* (3), may be taken as representative of the former class of cases. On the other hand, the decision in *Nundo Kumar Nasker* v. *Banomali Gayan* (4), where Hill J. refers to the instructive cases of *Hodgins* v. *Hickson* (5), and *Minet* v. *Johnson* (6), may be taken as the type of the second class of cases. I do not feel pressed by the decisions in *Mullick Kefait Hossein* v. *Sheo Pershad Singh* (7), and *Sarala Sundari Dasi* v. *Sarada Prosad Sur* (8), which ruled that under the Code of 1882 there was no provision for joinder of distinct causes

(1) [1899]1 Ch. 393.
(2) [1907] 1 K. B. 264.
(3) (1897) I. L. R. 24 Calc. 831.
(4) (1902) I. L. R. 29 Calc. 871.
(5) (1878) 39 L. T. 644; 12 Ir. L. T. 104.
(6) (1890) 63 L. T. 507.
(7) (1896) I. L. R. 23 Calc. 821.
(8) (1904) 2 C. L. J. 602, 606.

of action against distinct defendants. The Code of 1908 brings the rules on the subject in a line with the corresponding rules in England, and the object which the framers of the new Code had in view would be completely frustrated, were the Courts to allow their effect to be qualified by reference to decisions under the Code of 1882, pronounced on provisions some of which, at any rate, have been omitted or materially altered (see, for instance, sections 31 and 45 of the Code of 1882).

There is no force in the contention that grave inconvenience will be caused to some of the parties, as they will have to be present during the discussion of questions which specially affect others alone. The remedy for any possible inconvenience on this ground is supplied by the provisions of Order II, rule 6, which authorises the Court to order separate trials of causes of action which, though joined in one suit, cannot be conveniently tried or disposed of together. As pointed out by Scott C. J. in *Umabai* v. *Vithal* (1), the Court is competent to direct the successive trial of the issues separately affecting different defendants and to record interlocutory judgments thereon, to be made the basis of the final judgment at the conclusion of the trial of the whole case.

In my opinion, the suit as framed is not open to objection on the ground of misjoinder of parties and causes of action and should consequently be tried on the merits. I agree that the appeal must be allowed with costs and the order of Mr. Justice Chitty reversed.

O.M. *Appeal allowed.*

Attorneys for the appellants: *Watkins & Co.*

Attorneys for the respondents: *Morgan & Co.; Dutt and Sen; H. M. Given-Wilson; Pugh & Co.; Orr, Dignam & Co.; A. C. Bose.*

(1) (1908) I. L. R. 33 Bom. 293.

APPEAL FROM ORIGINAL CIVIL.

Before Sanderson C.J. and Mookerjee J.

1917

March 28.

PREMSUK DAS ASSARAM

v.

UDAIRAM GUNGABUX*.

Commission Agency—Suit for recovery of amount due in respect of Commission agency—Practice and Procedure—Adjustment of accounts—Part of claim admitted by the defendant—Judgment on admissions—Liberty to plaintiff to prove balance of claim—Jurisdiction of Court—Discretionary powers—Civil Procedure Code (Act V of 1908), O. XII, r. 6.

Under O.XII, rule 6 of the Civil Procedure Code, the Court has jurisdiction to enter judgment for the amount admitted to be due from the defendants to the plaintiffs and it is in the Judge's discretion, having regard to the nature of the case and the allegations contained in the pleadings and the admission made in Court, whether he will allow the plaintiffs to proceed to prove the remainder of their claim.

The discretion of the Judge is judicial, and an erroneous exercise thereof may be open to correction by a Court of Appeal, which, however, will be slow to interfere unless either of the parties has been manifestly and unfairly prejudiced.

APPEAL by Premsuk Das Assaram, the defendant-firm.

The defendant-firm employed the firm of Udairam Gungabux as their commission agents in Calcutta and business was transacted between them up to the 15th October, 1915, in terms and upon conditions set out in an agreement. On the 4th April, 1916, the firm of Udairam Gungabux instituted a suit for recovery of Rs. 6,831-1-0 from the defendant-firm in respect of their commission agency. In their plaint the plaintiffs alleged that the last adjustment of accounts took place

* Appeal from Original Civil, No. 77 of 1916, in Suit No. 397 of 1916.

on the 25th March, 1915, and a sum of Rs. 9,329-5-6 was found due by the defendants to the plaintiffs, that thereafter, business continued on the same terms and conditions up to the 15th October, 1915, when the dealings between the parties ceased, and that there was due from the defendants to the plaintiffs the sum of Rs. 6,038-5-6, which amount together with the interest thereon calculated up to the 4th April, 1916, aggregated the sum of Rs. 6,813-1-0. The defendants in their written statement denied that there was any adjustment on the 25th March, 1915, or that Rs. 9,329-5-6 was found due from them to the plaintiffs on such adjustment. They, however, stated that the last adjustment between the plaintiffs and themselves took place some time in March or April, 1914, in respect of dealings for the *Sumbut* year 1970, and set out a transaction in respect of certain goods to the value of Rs. 4,500 or thereabouts, which took place shortly prior to the said adjustment. They further stated in their written statement that on an account being taken of the dealings between the parties during the *Sumbut* years 1970, 1971 and 1972, it would be found that the sum of Rs. 4,500, or thereabouts, was due to the plaintiffs from the defendants, besides interest on the sum, and also stated that on the plaintiffs having demanded payment of their dues, the defendants paid the plaintiffs Rs. 2,700 in the course of 5 months, viz., from October, 1915, to February, 1916.

On the 19th May, 1916, the plaintiffs gave notice of application under O. XII, r. 6, for judgment or order that the defendant-firm do pay to the plaintiff firm the sum of Rs. 4,500 with such interest up to the date of institution of this suit as the defendant-firm admitted in its written statement without waiting for the determination of the question whether the defendant-firm was liable to the plaintiff-firm for the

1917

PREMSUK DAS ASSARAM v. UDAIRAM GUNGABUX.

additional sum claimed by the plaintiff-firm in the plaint herein and without prejudice to the plaintiff-firm's right to proceed with the suit for such balance or in the alternative for a direction that this suit be placed on the list for hearing at an early date and that the defendant-firm do pay to the plaintiff-firm their costs of and incidental to this application. On the 22nd May, 1916, Mr. Justice Fletcher heard the application and, on the admission, gave judgment for the plaintiffs for the said sum of Rs. 4,500 together with interest with liberty to the plaintiffs to prove their claim to the difference in the ordinary way. The defendants, thereupon, appealed.

Mr. S. R. Das (with him *Mr. P. N. Chatterjee*), for the appellants: The plaintiffs must take the admission by the defendants as a whole and in connection with the defence of which it was a part, or must set it aside and proceed to trial. If they wanted to avail themselves of the admission in the written statement they must take the negative as well as the affirmative allegations therein contained. They ought not to be allowed to rely on the admission in their favour and reject the negative portions against them in the pleadings and proceed with the suit for the balance of the alleged claim. *United Telephone Co.* v. *Donohoe* (1) and *Andrews* v. *The Patriotic Assurance Company of Ireland* (2) were relied on. The English Rule and the Irish Rule were the same. *Thorp* v. *Holdsworth* (3) was referred to. It was under the older Rule which was the same as the present Rule. In O. XII, r. 6 of the Civil Procedure Code, which corresponded with O. XXXII, r. 6, S. C. R., the words "any other question between the parties" meant any question other than

(1) (1886) 31 Ch. D. 399. (2) (1886) L. R. 18 Ir. 115.
(3) (1876) 3 Ch. D. 637.

the one in relation to which the admission was made.

Mr. N. Sircar (with him *Mr. S. Ghose*), for the respondents: *United Telephone Co.* v. *Donohoe* (1) was distinguishable. The respondents' case was clearly within the scope of O. XII, r. 6 of the Civil Procedure Code. If the words of the General Order XXXIX, rule 9 of the Irish Courts, were the same as those of O. XII, r. 6 of the Code, it must be conceded that *Andrews* v. *The Patriotic Assurance Company of Ireland* (2) was a case in point. The wording of rule 9 of the General Order XXXIX of the Irish Courts was stated to be similar to the wording of the English O. XXXII, r. 6 (1883), which was the same as O. XII, r. 6 of the Civil Procedure Code (1908). The wording of O. XII, r. 6, must, however, be looked to apart from the cases.

Mr. S. R. Das, in reply. The appellants' admission in respect of Rs. 4,500 was part of the defence and must be considered with the whole of it.

Cur. adv. vult.

SANDERSON C. J. This is an appeal by the defendant against the judgment of Fletcher J. whereby he directed that judgment should be entered for the plaintiffs for Rs. 4,500 with interest and costs, and that the plaintiffs were to be at liberty to prove their claim in respect of the balance of the claim in suit in the ordinary way.

This judgment was given upon a motion made by the plaintiff-firm under Order XII, rule 6.

The suit was for Rs. 6,813-1-0, and if necessary, for an account of the dealings and transactions between the parties and for an order on the defendant-firm to pay to the plaintiff-firm what on the taking of such

(1) (1886) 31 Ch. D. 399. (2) (1886) L. R. 18 Ir. 115.

1917

PREMSUK DAS ASSARAM v. UDAIRAM GUNGABUX.

SANDERSON C.J.

accounts might be found due by the defendant-firm to the plaintiff-firm.

It was alleged in the statement of claim that the plaintiff-firm had been acting as commission agents in Calcutta for the defendants on terms set out therein. That on the last adjustment of accounts, viz., on 25th March, 1915, a sum of Rs. 9,329-5-6 was found to be due from the defendants to the plaintiffs: that the business continued until 15th October, 1915, at which time the accounts showed a balance of Rs. 6,038-5-6 due to the plaintiffs and that with the interest thereon up to 4th April, 1916, amounting to Rs. 774-11-6, the total due at the time of institution of the suit was Rs. 6,813-1-0.

The material points of the defence are paragraphs 3, 4 and 5. In paragraph 3 the defendant denied that "there was any adjustment on the 9th day of *Chait*, 1972, corresponding with 25th day of March, 1915, or that Rs. 9,329-5-6 was found due by the defendant-firm to the plaintiff-firm, the fact being that the last adjustment took place some time in March or April, 1914, in respect of dealings between the parties for the *Sumbut* year 1970 and since then there was no other adjustment. Shortly prior to the said adjustment, the plaintiff had sent certain goods of the value of Rs. 4,500 or thereabouts to the defendants which had not been ordered by the defendants." Then he proceeded to say that "shortly thereafter the plaintiff-firm sent their accounts of the dealings for the *Sumbut* year 1970 and Badridas Jalooka Gomastha of the plaintiff-firm came to adjust the accounts for the *Sumbut* year 1970. The defendant Assaram Agarwalla told the said Badridas Jalooka to take back the unordered goods. Whereupon Badridas Jalooka asked Assaram to sell those goods and in the next accounts between the parties the plaintiff-firm would not charge any interest on the price of the unordered goods and

would also pay to the defendant-firm all losses to be incurred by them in the sale of those goods.

In paragraph 4 the defendant said, "with reference to the exhibit A annexed to the plaint the defendant-firm states that the item of Rs. 9,329-5-6 on the debit side of the said exhibit is not correct, the fact being that a much smaller sum was due to the plaintiff-firm at the end of the *Sumbut* year 1971, inasmuch as the same will be reduced by the interest charged by the plaintiff-firm on the said sum of Rs. 4,500 and by the losses incurred by the defendant-firm on the sale of the unordered goods aforementioned."

Then in paragraph 5 he said, "with reference to the 7th and 8th paragraphs the defendant-firm state that on an account being taken of the dealings between the parties during the years 1970, 1971 and 1972 it will be found that the sum of Rs. 4,500 or thereabouts is due to the plaintiff-firm from the defendant-firm besides interest on the sum."

On these pleadings, the application was made by the plaintiffs for leave to enter judgment for Rs. 4,500 with interest on the ground of the admissions contained in the statement of defence. It was not denied by the defendants at the hearing of the application that the plaintiffs were entitled to judgment for Rs. 4,500 and interest; but the defendants alleged that if such judgment were obtained, the plaintiff should not be allowed to proceed with the suit as to the remainder of their claim.

Fletcher J. decided that the plaintiffs were entitled to judgment for Rs. 4,500 and interest and further that they should be at liberty to prove their claim to the balance, and consequently this appeal was lodged by the defendants.

The learned Judge in his judgment said: "In this case there is no doubt that the defendant admits that

1917

PREMSUK DAS ASSARAM v. UDAIRAM GUNGABUX.

SANDERSON C.J.

Rs. 4,500 is due to the plaintiff. I asked the learned counsel appearing for the defendant whether he still admitted that Rs 4,500 was due to the plaintiff, and he said he did so. The admissions need not necessarily be made in the pleadings; they can be made otherwise, and under Order XII, rule 6, a verbal admission is sufficient to enter up judgment provided the Court is satisfied that the admission was in fact made. That being so, there cannot be any doubt that in this case there was a clear admission that Rs. 4,500 was due."

Now, Order XII, rule 6, provides as follows: "Any party may at any stage of a suit, where admissions of fact have been made, either on the pleadings, or otherwise, apply to the Court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the Court may upon such application make such order, or give such judgment, as the Court may think just."

I assume from the abovementioned extract from the judgment that the learned Judge satisfied himself that there was a clear and unambiguous admission by the defendants that in any event Rs. 4,500 was due from them to the plaintiffs. Assuming that to be so, I am of opinion that the learned Judge had jurisdiction to enter judgment for that amount, and it was in his discretion, having regard to the nature of the case and the allegations contained in the pleadings and the admission made in Court, whether he would allow the plaintiffs to proceed to prove the remainder of their claim.

I do not think that the case of the *United Telephone Co.* v. *Donohoe* (1) covers the point raised in this case.

(1) (1886) 31 Ch. D. 399.

The abovementioned case was an action for infringement of a patent and the defendant admitted ten instances of infringement, but denied he had committed any others: the plaintiffs, thereupon, moved for judgment upon the admissions in the pleadings: in the Court of first instance the Vice-Chancellor granted an injunction against infringement by the defendants of the plaintiff's patent, but he refused an enquiry as to damages. The Court of Appeal held that the plaintiffs were entitled to an enquiry as to damages, but that it must be limited to the instances of infringement admitted; and that the judgment having been obtained upon a motion for judgment upon the pleadings, the plaintiffs were bound to take the negative as well as the affirmative allegations therein.

The question whether the Judge, who in the first instance heard the application, would have had jurisdiction to give judgment on the admissions and to allow the plaintiffs to proceed to prove the rest of their claim as to the other alleged infringements, if such an application had been made, was not before the Court.

The case of *Andrews* v. *The Patriotic Assurance Co. of Ireland* (1) does not decide that the Judge hearing the application had no jurisdiction to make the order asked for in that case; it amounts to a decision merely that having regard to the circumstances of that case and the form of the pleadings, the Judge was entitled to exercise his discretion and to decide that the plaintiff ought not to have judgment for the £62 and yet proceed to trial of the remainder of the case.

This being a matter of discretion, we ought not to interfere unless it is clear that the discretion was wrongly exercised.

(1) (1886) L. R. 18 Ir. 115.

1917

PREMSUK DAS ASSARAM v. UDAIRAM GUNGABUX.

SANDERSON C.J.

In this case I cannot say that it is clear that the discretion of the learned Judge has been wrongly exercised.

The main question which remains to be tried is, whether the arrangement alleged by the defendants in their defence to have been made with respect to the unordered goods was in fact made, and, if so, how much must be deducted in respect thereof from the plaintiff's total claim.

This seems to be an issue independent of the other part of the claim, and, even if it were decided in favour of the defendants it would not, having regard to the abovementioned admission made by the defendants in Court, reduce the plaintiff's claim below Rs. 4,500.

With regard to the question of costs, I think that the plaintiffs should not at present be given the costs of the suit; but that these costs should be reserved until the trial, when they will be in the discretion of the Judge who tries the matters which remain for decision.

The plaintiffs are entitled to the costs of the application for judgment. For these reasons, in my judgment, the appeal should be dismissed on the main point raised therein but that the decree as to costs should be varied in the manner abovementioned.

There will be liberty to apply with respect to the question of costs to the learned Judge on the Original Side in the event of the parties not proceeding to the trial of the remainder of the plaintiff's claim.

I think that the parties should bear their own costs of this appeal.

MOOKERJEE J. This is an appeal by the defendant from a judgment on an application by the plaintiff under Order XII, rule 6 of the Code of Civil Procedure, 1908. The plaintiff-firm instituted this suit for the

recovery of a sum of money from the defendant-firm in respect of a commission agency. The plaintiff-firm allege that accounts had been adjusted between them on the 25th March, 1915, when a sum of Rs. 9,329-5-6 was found due from the defendant-firm, that thereafter business was continued on the same terms and conditions as before, down to the 15th October, 1915, and that, on the 4th April, 1916, when the suit was instituted, an aggregate sum of Rs. 6,813-1-0 inclusive of interest was recoverable from the defendant. The written statement of the defendant-firm denied the alleged adjustment of accounts, mentioned a transaction on terms other than those previously arranged, and contained an admission that if an account were taken of the dealings between the parties and credit allowed for all payments made, the sum of Rs. 4,500 or thereabouts would be found due to the plaintiff-firm besides interest on such sum. Thereupon, on the 19th May, 1916, the plaintiff-firm applied to the Court under Order XII, rule 6 for judgment for Rs. 4,500 with interest thereon according to the admission of the defendant-firm. Mr. Justice Fletcher heard the application on the 22nd May. In reply to a question put by the Court to counsel for the defendant, whether he still admitted that Rs. 4,500 was due to the plaintiff, an answer was given in the affirmative. The Court, thereupon, proceeded to give judgment for the plaintiff for Rs. 4,500 with liberty to the plaintiff to prove in the ordinary way the claim for the difference. The plaintiff was also awarded the costs of the application and the cost of the suit. The defendant has appealed to this Court on the ground that the Court could not, or at any rate should not, have given judgment to the plaintiff under Order XII, rule 6. It is consequently necessary to examine the terms of the rule and determine its exact scope.

1917

PREMSUK DAS ASSARAM v. UDAIRAM GUNGABUX.

MOOKERJEE J.

Order XII, rule 6, which reproduces Order XXXII, rule 6 of the English Rules is as follows :

"Any party may, at any stage of a suit, where admissions of fact have been made, either on the pleadings or otherwise, apply to the Court for such judgment or order as upon such admissions he may be entitled to, without waiting for determination of any other question between the parties, and the Court may, upon such application, make such order or give such judgment as the Court may think just."

The rule, it will be observed, is expressed in comprehensive terms, and the only requisite for a judgment under the rule in favour of the plaintiff is that admission of facts should have been made by the defendant, either on the pleadings or otherwise. It would be obviously improper for the Court to read into the rule qualifications which may restrict its application. But a judgment on admission is not a matter of right, it is in the discretion of the Court, so that if a case involves questions which cannot be conveniently disposed of on a motion under the rule, the Court may, in the exercise of its discretion, refuse the motion. The discretion is judicial, and an erroneous exercise thereof may be open to correction by a Court of Appeal which, however, on well established principles, will be slow to interfere, unless either of the parties has been manifestly and unfairly prejudiced. See the observation of Jessel M. R. in *Mellor* v. *Sidebottom* (1). Subject to these observations, I cannot hold that any crystallised rules can be formulated to regulate the exercise of the discretion vested in the trial Court. It has been urged, however, that such rules are deducible from cases in the reports, and reference has specially been made to the decision in *United Telephone Co.* v. *Donohoe* (2) which arose under R. S. C.

(1) (1877) 5 Ch. D. 342. (2) (1886) 31 Ch. D. 399.

Order XXXII, rule 6, and *Andrews* v. *The Patriotic Assurance Co. of Ireland* (1) which turned upon the construction of R. S. C. (Ir.) Order XXXII, rule 6; it may be observed that the Irish rule is identical in terms with the English rule. These cases, though not binding upon us as authorities, are valuable guides, in the interpretation of the rule in our Code, for, as observed by White C. J. in *Lovelock and Lewis* v. *Malabar Timber and Saw Mills* (2), in considering the construction of a section in an Indian Act which is professedly based on an English enactment, which in fact reproduces the language of the English enactment, we are in practice, if not in theory, bound by the decisions of the English Court of Appeal. The cases mentioned, however, do not assist the appellants. In the first case, the defendant in an action for infringement of a patent admitted certain instances of infringement but denied that he had committed any others. The plaintiffs, thereupon, moved for judgment upon the admission in the pleadings. Bacon V. C. granted a perpetual injunction but refused an enquiry as to the damages. The plaintiffs appealed and contended that a direction might be added for an enquiry as to the damages sustained by them by reason of the infringement mentioned in the pleadings. The Court of Appeal ruled that they were entitled to an enquiry as to the instance of infringement admitted in the pleadings, but as to no others. This decision is not an authority for the proposition that the plaintiff might not have joined issue and set down the action for trial as regards the infringements not admitted by the defendant. The decision in *Andrews* v. *The Patriotic Assurance Co. of Ireland* (1) seems at first sight more favourable to the contention of the appellant, but upon closer examination turns out to be

(1) (1886) L. R. 18 Ir. 115. (2) (1913) 13 Mad. L. T. 282

1917

PREMSUK DAS ASSARAM v. UDAIRAM GUNGABUX.

MOOKERJEE J.

an authority only for the proposition that the Court has a discretion to exercise in relation to applications for judgment on admissions and may impose terms if relief be given. The case is not an authority for an inflexible rule that the plaintiff who applies for judgment upon an admission must always take the admission as a whole or must ignore the admission and proceed to trial. In my opinion, it would be lamentable if the discretion, which, for the best of reasons, has been left free and untrammelled by the Legislature, were to be crystallised by judicial decisions, as it would become in course of time, by one Judge attempting to prescribe definite rules with a view to bind other Judges in the exercise of the discretion which must be applied with due regard to the varying circumstances of each particular case. I must consequently decline to interpret Order XII, rule 6, so as to restrict its operation to cases where the plaintiff accepts the admission of the defendant in its entirety or where the claim is severable into distinct portions and the defendant admits his liability in respect of one such fragment of the claim. I do not also feel pressed by the argument that if a decree is made first on admission in respect of one portion of the claim and then on investigation as to the remainder, there may ultimately be two decrees in same suit. I see nothing objectionable in principle to such a result, specially in view of the provisions of Order XXIV which treats of payments into Court. In my opinion, the case before us falls within the scope of Order XII, rule 6, and sufficient grounds have not been assigned to induce us to hold that the order made by Mr. Justice Fletcher was unjust to the defendant. The direction for costs was, however, inappropriate and I agree that, subject to modification in that respect

as stated in the judgment of the learned Chief Justice, the order should be affirmed.

O. M. *Appeal dismissed.*

Attorney for the appellants: *Asutosh De.*

Attorney for the respondents: *Debi Prasad Khaitan.*

1917

PREMSUK DAS ASSARAM v. UDAIRAM GUNGABUX.

APPELLATE CIVIL.

Before Fletcher and Newbould JJ.

NANDA LAL BANERJEE

v.

UMESH CHANDRA DAS.*

1917

April 20.

Sale—Date of sale, whether date of confirmation—Bengal Tenancy Act (VIII of 1885), ss. 167, 69.

The words "date of sale" referred to in s. 167 of the Bengal Tenancy Act mean the date when the sale is confirmed and not the date when the property is actually sold to the purchaser.

Matangini Chaudhurani v. *Sreenath Das* (1) referred to.

Banko Behary Das v. *Krishna Chandra Bhowmick* (2) approved.

Yusuf Gazi v. *Asmat Mollah* (3) dissented from.

SECOND APPEAL by Nanda Lal Banerjee (plaintiff).

The facts are briefly as follows: One Kamini Debi, widow of Bhupal Matilal, held a tenure of 205 bighas under the landlord Amritalal Banerjee; her right was *mokurari mourasi*, and under her the defendant held about 75 bighas in *dar mokurari* right. Amritalal Banerjee obtained a decree for rent due from the holding against Kamini Debi, and in execution of that

*Appeal from Appellate Decree, No. 134 of 1915, against the decree of H. Walmsley, District Judge of 24-Parganas, dated Sep. 12, 1914, confirming the decree of Latu Behary Bose, Subordinate Judge of Alipore, dated June 30, 1913.

(1) (1903) 7 C. W. N. 552.

(2) (1913) 18 C. W. N. 349, 353; 18 C. L. J. 170.

(3) (1912) 17 C. W. N. 440.

1917

NANDA LAL BANERJEE v. UMESH CHANDRA DAS.

decree the tenure was bought by the plaintiff, Nanda Lal Banerjee, who alleged that he bought it free of encumbrances but when he tried to take khas possession, the defendant Umes Chandra Das resisted him on the strength of the *dar mokurari pottas* granted by Bhupal and Kamini. He then caused notices to be served on the defendant under section 167 of the Bengal Tenancy Act, and as the defendant did not vacate the land he brought this suit for khas possession. The defendant urged, *inter alia*, that the notices were not valid. The learned Subordinate Judge of Alipore dismissed plantiff's suit on 30th June, 1913, holding that his application under section 167 was barred by limitation as it was made more than 12 months after the sale and he also had notice of the encumbrance before his purchase at the execution sale. Plaintiff's appeal was dismissed by the District Judge of the 24-Parganas and he, thereupon, preferred this appeal to the High Court.

Babu Dwarka Nath Chakravarti (with him Babu *Ramtaran Chatterji*), for the appellant. Under the new Code of Civil Procedure, the right to annul encumbrances is an inchoate right and though accruing from the date of confirmation, dates back to that of the sale. The defence was (i) that the plaintiff was a mere *benamidar* for the defaulting tenant; and (ii) that no notice under section 167 had been served. Even if this defence is available, from date of sale the suit is more than a year, but from date of confirmation the suit is within a year. There is a conflict of rulings with regard to the meaning of section 167. I submit it has to be read as "notice *as* a purchaser." The law requires not only that he had notice, but also that he remembered it. I submit that a notice is no notice unless a man has the right to take notice of it;

therefore, a notice must be notice to the purchaser. If a man relies upon notice before purchase he must prove that I was aware of it. Encumbrances are set aside only from date of service of notice. Date of sale means date of confirmation: *Banko Behary Dos* v. *Krishna Chandra Bhowmick* (1).

The question is, what is the meaning of the word "sale" in section 167? The sale may be set aside and then not be confirmed till after a couple of years after coming up to the High Court, and thus the purchaser does not get any time to enforce his right.

[FLETCHER J. Under the old Code the right accrues from the date the sale is made absolute.]

I ask your Lordships to follow the decision of Mr. Justice N. R. Chatterjea in *Banko Behary* v. *Krishna Chandra Bhowmick* (1) in preference to that in *Yusuf Gazi* v. *Asmat Mollah* (2).

Babu Mahesh Chandra Banerjee (for *Babu Jyolish Chandra Hazra*), for the respondent, commented on the decision in *Banko Behary* v. *Krishna Chandra Bhowmick* (1) and submitted that the decision of Chatterjea J. had no bearing on the present point. It was merely an *obiter*.

[FLETCHER J. If his title had not accrued till confirmation, it is clear he could not give notice before his title had accrued. It was clearly the view of Maclean C. J., that a sale did not take place until it was confirmed.]

I rely on section 167 itself, which says that notice must be served within a year of the date when sale took place.

Babu Dwarka Nath Chakravarti, in reply, referred to *Bibi Taibatannessa Chowdhurani* v. *Pravabati Dasi* (3).

(1) (1913) 18 C. W. N. 349, 351; 18 C. L. J. 170.

(2) (1912) 17 C. W. N. 440.

(3) (1909) 10 C. L. J. 640, 644.

1917

NANDA LAL BANERJEE v. UMESH CHANDRA DAS.

FLETCHER J.

FLETCHER J. This is an appeal from a decision of the learned District Judge of the 24-Parganas affirming the decision of the Subordinate Judge of Alipore. The plaintiff sued for a declaration of his right to a putni which he had purchased at a sale for arrears of rent held under the provisions of the Bengal Tenancy Act. The sale, at which the plaintiff purchased, took place on the 16th December, 1907. Litigation ensued after the sale and the sale was not confirmed until the 5th September, 1908. On the 22nd September, 1908, the plaintiff took possession and the present defendant then set up a dar-putni right. On the 8th March, 1909, an application was made under section 167 of the Bengal Tenancy Act to annul the defendant's encumbrance and the notice was served on the 13th April, 1909. The present suit was brought on the 12th April, 1912. The defence, as raised by the defendant in his written statement, was, first of all, that the plaintiff was the *benamidar* of the defaulting tenant. That was found against the defendant. So was also the defence raised that no notice had been served under the terms of section 167 of the Bengal Tenancy Act. But the suit was dismissed on the ground that the plaintiff had notice of the defendant's encumbrance before he purchased the property and, therefore, he was out of time under the terms of section 167 in not having served the notice to annul the defendant's encumbrance in time. It has been argued in this appeal that that point was not raised in the defence and no issue had been settled with regard to it and that the defendant ought not to have been allowed to enter into that defence. There is a good deal to say with regard to that. In the view that I take of the authorities of this Court, I am unable to agree with the view of the learned Judge of the lower Appellate Court that the date of the sale was the

16th December, 1907, and not the date on which the sale was confirmed, namely, the 5th September, 1908. If the date of sale mentioned in section 167 of the Bengal Tenancy Act is the date when the sale is confirmed, then it is quite clear that the notice that was served on the 13th April, 1909, was within one year from the date of the sale. The sale to the plaintiff was made under the provisions of the Code of Civil Procedure of 1882 and, under section 316 of that Code, the title to the property sold in execution vested in the purchaser from the date of the certificate of sale and not before. Section 65 of the present Code of Civil Procedure is in different terms. The question as to what is the meaning of the words 'date of sale' as used in the sections of the Bengal Tenancy Act has formed the subject of judicial decision in certain cases before this Court. The first case that reference may be made to is the case of *Matangini Chaudhurani* v. *Sreenath Das* (1) where Maclean C. J. and Mr. Justice Stevens held that the words 'date of sale' used in section 169, sub-section (*1*), cl. (*c*), of the Bengal Tenancy Act meant the date of the confirmation of sale and not the actual date of sale. It is quite true that that decision was on section 169; but there cannot be any difference, so far as I can see, between the meaning of the words 'date of sale' as used in section 169 and in section 167. It is quite true that subsequent to that decision, the Legislature amended section 169 by altering the words 'date of sale' to 'the date of the confirmation of sale'; but still the decisions of this Court remain unaffected that the words 'date of sale' used in the Act as they existed before the amendment meant the date when the sale was confirmed. There is no reason why that decision should not govern the words 'date of sale' as used in section 167. The next

(1) (1903) 7 C. W. N. 552.

1917

NANDA LAL BANERJEE v. UMESH CHANDRA DAS.

FLETCHER J.

decision that reference may be made to is the decision in the case of *Yusuf Gazi* v. *Asmat Mollah*(1), a decision of Mr. Justice Brett and Mr. Justice Sharfuddin. There the learned Judges held that the words 'date of sale' in section 167 meant the date on which the sale of holding or tenure had actually taken place and the reason on which they based their judgment is this: that as section 169 as amended referred to the date of the confirmation of the sale, therefore in section 167 where the words 'the date of the confirmation of the sale' did not appear the words 'date of sale' must refer to a period other than the date of the confirmation of the sale. In my opinion, there is a manifest fallacy. Section 167 and section 169 prior to the amendment both used the same words, namely, the words 'date of sale.' It was judicially declared in this Court that the words 'date of sale' in section 169 meant the date of the confirmation of the sale, and the Legislature in amending section 169 clearly did not consider the terms of section 167, and section 167 remained unaffected by that amendment. I think the learned Judges who decided the case of *Yusuf Gazi* v. *Asmat Mollah* (1), were not justified in distinguishing the case, or, at any rate, in departing from the decision in the case of *Matangini Chaudhurani* v. *Sreenath Das* (2), on the ground that by a subsequent amendment of section 169 different words had been used to those that appeared in section 167. It may be doubted whether the same learned Judges in a subsequent case did not to some extent go back upon that decision because in the case of *Bibi Taibatannessa Chowdhurani* v. *Pravabati Dasi* (3) those learned Judges came to the conclusion that in certain circumstances the words 'date of sale,' as mentioned

(1) (1912) 17 C. W. N 440. (2) (1903) 7 C. W. N. 552.
(3) (1909) 10 C. L. J. 640, 644.

1917

NANDA LAL BANERJEE v. UMESH CHANDRA DAS.

FLETCHER J.

in section 167 of the Bengal Tenancy Act, meant the date of the confirmation of the sale. With all due respect to the learned Judges, the conduct of a defendant cannot alter the meaning of the words used by the Legislature in a particular section of an Act. I think the learned Judges in *Taibatannessa* v. *Pravabati* (1), have shown that in certain cases, at any rate, the words 'date of sale' as used in section 167 of the Bengal Tenancy Act, mean the date when the sale is confirmed. The next decision that has been referred to is the decision of a Judge sitting singly in this Court, that is, the decision of Mr. Justice N. R. Chatterjea in the case of *Banko Behary Das* v. *Krishna Chandra Bhowmick* (2). There the learned Judge held distinctly that the words 'date of sale' used in section 167 of the Bengal Tenancy Act meant the date when the sale was confirmed and he did so relying upon the decision of this Court in the case of *Matangini* v. *Sreenath Das* (3). It is quite true that that decision is not binding on us; but the opinion of the learned Judge is, of course, entitled to the highest respect. In his view, that case was covered by the case of *Matangini Chaudhurani* v. *Sreenath Das* (3) and I think he rightly held so. The case of *Matangini Chaudhurani* v. *Sreenath Das* (3), which is the first of these authorities, is not distinguishable from the present case. It is quite true that against the decision of Mr. Justice N. R. Chatterjea a Letters Patent Appeal was preferred; but the judgment of the learned Judges who heard the Letters Patent Appeal rested on grounds other than that as to the meaning of the words 'date of sale' as used in section 167, but they cast no doubt upon the correctness of the decision of Mr. Justice N. R. Chatterjea in that respect.

(1) (1909) 10 C. L. J. 640. (2) (1913) 18 C. W. N. 349, 351.
(3) (1903) 7 C. W. N. 552.

1917

NANDA LAL BANERJEE v. UMESH CHANDRA DAS.

FLETCHER J.

I think the words 'date of sale', especially where the sale took place under the Code of 1882 and where the purchaser could acquire no interest until the sale certificate was issued, mean clearly the date of the confirmation of the sale. To hold otherwise would practically in some cases take away from the plaintiff the right to annul encumbrances at all because, as in the present case where the plaintiff has been found to have known of the encumbrance before the date of the actual sale and litigation ensued and the sale was not confirmed for a considerable time after the date of the sale, if the date referred to in section 167 of the Bengal Tenancy Act be the date of the actual sale, then the purchaser will have no period within which he can annul encumbrances unless he elects to annul the encumbrances before his title to the property has been finally determined. I think that the view that was expounded by Mr. Justice N. R. Chatterjea in the case of *Banko Behary Das* v. *Krishna Chandra Bhowmick* (1), is the correct view, and that the words 'date of sale' referred to in section 167 of the Bengal Tenancy Act mean the date when the sale is confirmed and not the date when the property is actually sold to the purchaser. That being so, even if this defence was open to the defendant in this case, I think it was not sufficient to bar the plaintiff's suit. The learned Judge of the lower Appellate Court dismissed the plaintiff's suit on his finding that the plaintiff was out of time for the purpose of annulling the encumbrance. There were other issues arising on the merits, and they have not been determined. The case must, therefore, go back to the lower Appellate Court to have the appeal reheard with reference to the other issues which have not been

(1) (1913) 18 C. W. N. 349 ; 18 C. L. J. 170.

disposed of. Costs will abide the result of the re-hearing by the lower Appellate Court.

1917

NANDA LAL BANERJEE v. UMESH CHANDRA DAS.

NEWBOULD J. I agree.

G. S. *Appeal allowed; case remanded.*

LETTERS PATENT APPEAL.

Before Mookerjee and Beachcroft JJ.

AMBAR ALI

v.

LUTFE ALI.*

1917

April 23.

Parties—Admission of one of the parties to a suit—When such admission receivable against other defendants—Identity—A document per se not inadmissible—Objection to its admission in appeal for the first time.

When several persons are jointly interested in the subject-matter of a suit, an admission of any one of these persons is receivable not only against himself but also against the other defendants, whether they be all jointly suing or sued, provided that the admission relates to the subject-matter in dispute and be made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered. The requirement of the identity in the legal interest between the joint owners is of fundamental importance.

Kowsulliah Sundari v. *Mukta Sundari* (1), *Chalho Singh* v. *Jharo Singh* (2), *Mexjan Matbar* v. *Alimuddi* (3), *Blenkinsopp* v. *Blenkinsopp* (4) referred to.

The admission of one co-plaintiff or co-defendant is not receivable against another merely by virtue of his position as a co-party in the litigation. If the rule were otherwise, it would in practice permit a litigant to

* Letters Patent Appeal No. 121 of 1915 in Appeal from Appellate Decree No 1525 of 1914.

(1) (1885) I. L. R. 11 Calc. 588.
(2) (1911) I. L. R. 39 Calc. 995.
(3) (1916) I. L. R. 44 Calc. 130.
(4) (1848) 11 Beav. 134; 2 Phillip. 607.

1917

AMBAR ALI v. LUTFE ALI.

discredit an opponent's claim merely by joining any person as the opponent's co-party and then employing that person's statements as admissions. Consequently, it is not by virtue of the person's relation to the litigation that the admission of one can be used against the other; it must be because of some priority of title or of obligation.

Morse v. *Royal* (1), *King* v. *the Inhabitants of Hardwick* (2) referred to.

The Court will not entertain, for the first time, in appeal an objection that a document which *per se* is not inadmissible in evidence has been improperly admitted in evidence.

Girindra Chandra Ganguli v. *Rajendra Nath Chatterjee* (3), *Preonath Mozumdar* v. *Durga Tarini Ghose* (4) referred to.

APPEAL by Ambar Ali and others, the defendants.

The facts are shortly these. The plaintiffs instituted a suit for recovery of possession of a tank on declaration of title. The plaintiffs' case was that the tank in question was excavated by Laskar Gazi more than 100 years ago and that the plaintiff No. 1 as the direct lineal descendant of Laskar Gazi and the plaintiffs 2 to 4 as the descendants of Laskar Gazi through his daughter Akma, succeeded to the tank by right of inheritance on the death of their respective predecessors and held possession of it by repairing the tanks, etc., etc., that the tank was recorded in the name of Laskar Gazi in the *khasra khatyan* of the Record of Rights but in the final records for reasons not known to the plaintiffs the entry was omitted, that the plaintiffs continued in possession of the same until dispossessed by the defendants in Chaitra 1317 B. S.

The defendants 1 to 5 contested the claim and the defence shortly stated was that the claim was barred by limitation, that it was bad for defect of parties, that the defendants 6 to 9 had no interest in the tank and had been impleaded as defendants in order to deprive the defendants of weighty evidence, that the tank was not excavated by Laskar Gazi, that the tank

(1) (1806) 12 Ves. 355, 361.
(2) (1809) 11 East 578.
(3) (1897) 1 C. W. N. 530.
(4) (1911) 14 C. L. J. 578.

was a silted up tank and was treated as one abandoned by the previous owners, that the defendants who exercised possession over the tank in various ways on account of its contiguity to their homestead, applied for its settlement with them in the *sherista* of the Raja of Hill Tipperah in whose name the land was recorded in the Record of Rights and got a *pattah* from the Raja and have been holding possession of the tank as *ryats* ever since. The trial Court dismissed the suit. Upon appeal, the Subordinate Judge reversed the decision of the trial Court upon the question of title as also upon the question of possession, and found in favour of the plaintiffs. On second appeal, the decree of the Subordinate Judge was attacked upon the ground that he had relied upon two pieces of evidence not admissible in law. Mr. Justice Newbould, sitting alone, overruled this contention and dismissed the appeal. Hence this appeal under clause 15 of the Letters Patent.

Babu Birendra Chandra Das, for the appellants.

Babu Ram Doyal Dey, for the respondents.

Cur. adv. vult.

MOOKERJEE J. This is an appeal, under clause 15 of the Letters Patent, from the judgment of Mr. Justice Newbould in a suit for recovery of possession of a tank on declaration of title. The plaintiffs alleged that the disputed tank had been excavated by their ancestor, Laskar Gazi Mozumdar, about a century ago, that it had always been known by his name and had been owned and possessed by members of the family from generation to generation, and that they themselves were in peaceful possession when they were forcibly dispossessed by the defendants in 1911. They accordingly instituted this suit on the 27th November.

1917

AMBAR ALI v. LUTFE ALI.

MOOKERJEE J.

1911, for recovery of possession on establishment of title. The defendants contended that the tank was not known by the name of Laskar Gazi and was never held by his descendants. They asserted that it had been abandoned by the previous owners, had become silted up and had ultimately been settled with them on the 24th October, 1911, by the proprietor of the estate, the Maharaja of Tipperah. The trial Court held that the plaintiffs had failed to establish their alleged ancestral right to the tank and that their claim, even if well-founded, was barred by limitation. Upon appeal, the Subordinate Judge reversed the decision, as upon the question of title as also of possession, he found in favour of the plaintiffs. On second appeal to this Court, the decree of the Subordinate Judge was assailed on the ground that he had based his conclusion upon two pieces of evidence not admissible in law. Mr. Justice Newbould overruled this contention and dismissed the appeal. The objections urged before him have been reiterated in this Court.

One of the substantial points in controversy between the parties was, whether, as alleged by the plaintiffs, the tank was known by the name of Laskar Gazi. Besides oral testimony, the plaintiffs relied upon two pieces of documentary evidence, namely, *first*, an entry in a draft record of rights; and, *secondly*, a recital contained in a conveyance of an adjoining piece of land executed by the fourth and fifth defendants in favour of a stranger on the 7th October, 1894. The Subordinate Judge has relied upon both these documents, and the question for consideration is, whether they are admissible in evidence against the defendants.

As regards the entry in the draft record of rights to the effect that the tank is known by the name of

Laskar Gazi, there can be no room for controversy that it was not admissible in evidence: *Gulab Koer* v. *Ramratan Pande* (1). No reference should, consequently, have been made to the entry in the draft record, specially as it transpires that the entry was omitted from the record finally published on the 7th December, 1898, to which alone the presumption of correctness applies. The circumstance mentioned, however, does not vitiate the judgment of the Subordinate Judge, because it is plain that the lower Appellate Court arrived at the conclusion on the merits independently of the evidence improperly admitted: *Womes Chunder* v. *Chundee Churn* (2).

As regards the recital in the conveyance, the position is somewhat different, and requires closer examination. On the 27th August, 1894, the fourth and fifth defendants acquired title by purchase to a parcel of land on the border of the tank now in dispute. On the 7th October, 1894, they sold that land to one Hamidunnessa Bibi. In the schedule of boundaries in that conveyance, they stated that land then transferred was bounded by the tank of Laskar Gazi. The conveyance was produced at the trial by the scribe, was duly proved and was admitted in evidence without objection. The Subordinate Judge has used the recital as valuable evidence, not only against the fourth and fifth defendants who executed the conveyance, but also against the other defendants who were not parties to that transaction. There can be no room for controversy that the admission is good evidence against the makers of the conveyance, but the question arises whether it is admissible against the other defendants. These defendants, it will be observed, are jointly interested in the land now in dispute, along with the fourth and fifth defendants;

(1) (1913) 18 C. W. N. 896. (2) (1881) I. L. R. 7 Calc. 293.

1917

AMBAR ALI v. LUTFE ALI.

MOOKERJEE J.

in fact, they claim under a common lease from the landlord and have, on the basis thereof, taken a common defence to defeat the suit of the plaintiffs. But these defendants were not joint owners of the property covered by the conveyance of 1894, and were strangers to that transaction. They, consequently, press the view that an admission made by the owners of that property cannot be received in evidence against them, merely because since the date of the alleged admission, they have jointly acquired the property now in suit. In our opinion, this contention is well founded and section 18 of the Indian Evidence Act is of no assistance to the plaintiffs. The principle which regulates the reception in evidence of an admission by one defendant as against another defendant, was formulated in the cases of *Kowsulliah Sundari* v. *Mukta Sundari* (1), *Chalho Singh* v. *Jharo Singh* (2), and *Meajan Matbar* v. *Alimuddi Mia* (3). The principle is that when several persons are jointly interested in the subject matter of the suit, an admission of any one of these persons is receivable not only against himself but also against the other defendants, whether they be all jointly suing or sued, provided that the admission relates to the subject matter in dispute and be made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered. The requirement of the identity in legal interest between the joint-owners is of fundamental importance: *Blenkinsopp* v. *Blenkinsopp* (4). On this principle, the position has been maintained that the joint ownership must have existed at the time the statement was made. Thus in *Blakeney* v. *Fergusson* (5), it was ruled that the admissions of one person

(1) (1885) I. L. R. 11 Calc. 588.
(2) (1911) I. L. R. 39 Calc. 995.
(3) (1916) I. L. R. 44 Calc. 130.
(4) (1848) 11 Beav. 134; 2 Phillip 607.
(5) (1854) 14 Ark. 641.

cannot be admitted in evidence against another on the ground of a joint interest in the subject, unless the interest is a subsisting one at the time of the admission, and where the interest is derivative, it must have been acquired after the admission was made. To the same effect is the rule enunciated in *Kilburn* v. *Ritchie* (1), that the declaration of one of two joint owners is admissible against the other, if made at a time after the joint interest came into existence; if made before they became joint owners, the declaration is not admissible. The distinction is based upon obvious good sense. The admission of one co-plaintiff or co-defendant is not receivable against another merely by virtue of his position as a co-party in the litigation; if the rule were otherwise, it would in practice permit a litigant to discredit an opponent's claim merely by joining any person as the opponent's co-party, and then employing that person's statements as admissions. Consequently, it is not by virtue of the person's relation to the litigation that the admission of one can be used against the other; it must be, because of some priority of title or of obligation [*see* the observation of Erskine L. C. in *Morse* v. *Royal* (2), and Ellenborough C. J. in *King* v. *The Inhabitants of Hardwick* (3)]. The vital point for consideration, accordingly, is whether there is such priority of obligation or title between two persons as to justify the use of the admission of one against the other; and, plainly, this must be determined by reference to the relation between the parties at the time the admission is made. As a matter of probative value, the admission of a person (such as one joint-owner) having precisely the same interest at stake as another (his co-owner), will, in general, be likely to be equally

(1) (1852) 2 Calif. 145; 56 Am. Dec. 326.

(2) (1806) 12 Ves. 355, 361.

(3) (1809) 11 East 578.

1917

AMBAR ALI v. LUTFÉ ALI.

MOOKERJEE J.

worthy of consideration; there being an identity of legal liability, the two persons may be deemed one so far as affects the propriety of discrediting one by the statements of the other. This reason, however, ceases to be applicable where, as in the case before us, the admission was made at a time when the parties had no community of interest. The inference is thus irresistible that the recital in the conveyance of 1894, though admissible against the fourth and fifth defendants, is not admissible as admissions against the other defendants under section 18 of the Indian Evidence Act.

The question next arises, whether the recital in the conveyance is admissible against these defendants on any other principle. The decisions in *Abdullah* v. *Kunj Behary Lal* (1), *Imrit* v. *Sirdhari* (2), and *Natwar* v. *Alkhu* (3), show that the statement is admissible under section 32 (*3*) of the Indian Evidence Act. The statement by the vendors, that their land then conveyed was limited by certain boundaries, was an admission that their proprietary interest did not extend over any land outside the boundaries mentioned. The entire statement was, consequently, admissible: *Higham* v. *Ridgway* (4), *Conner* v. *Fitzgerald* (5), *Percival* v. *Nanson* (6), *Smith* v. *Blackey* (7), *R.* v. *Exeter* (8). The principle is that the statement is accepted, not merely as to the specific fact against the interest but also as to every fact contained in the same statement. Here, however, the plaintiffs have to face an unexpected difficulty. The statement can be made admissible under section 32(*3*), only if the

(1) (1911) 14 C. L. J. 467.
(2) (1911) 15 C. L. J. 7.
(3) (1913) 11 All. L. J. 139.
(4) (1808) 10 East 109; 2 Smith's L. C. 301.
(5) (1883) L. R. 11 Ir. 106.
(6) (1851) 7 Exch. 1.
(7) (1867) L. R. 2 Q. B. 306.
(8) (1869) L. R. 4 Q. B. 344.

conditions mentioned in the introductory words of the section are fulfilled, and those conditions admittedly have not been fulfilled in this case. Consequently, the plaintiffs cannot avail themselves of section 32 (*3*), and, there thus seems, at first sight, no escape from the position that while the appeal must be dismissed so far as the fourth and fifth defendants are concerned, the case must be remitted for reconsideration at the instance of the other defendants after exclusion of the recital in the conveyance. On careful consideration, however, of all the circumstances of the case, another aspect of the matter emerges for examination.

It is plain that if the plaintiff had cited the fourth and fifth defendants as witnesses, the recital in the conveyance executed by them could have been received in evidence to impeach their credit under section 155 (*3*) or to corroborate their testimony under section 157. Now, in the case before us, no objection was taken to the reception of the conveyance in evidence by any of the defendants. If such objection had been taken, it would have been open to the plaintiffs to avoid the difficulty by citing the fourth and fifth defendants as witnesses and by proceeding under section 155 (3), if they repudiated their admissions. It is perfectly true, as pointed out by Sir Richard Couch in *Miller* v. *Madho Das* (1), that an erroneous omission to object to evidence which is irrelevant and consequently inadmissible under any circumstances, does not make it admissible. But it is equally well-settled that the Court will not entertain for the first time in appeal an objection that a document, which *per se* is not inadmissible in evidence has been improperly admitted in evidence: *Girindra Chandra* v. *Rajendra Nath* (2), *Preonath* v. *Durga*

(1) (1896) L. R. 23 I. A. 106. (2) (1897) 1 C. W. N. 530.

1917

AMBAR ALI
v.
LUTFE ALI.

MOOKERJEE J.

Tarini (1). It is plain that the case before us falls within the latter principle. Assume for a moment that we accede to the contention of the appellants other than the fourth and fifth defendants; we shall have to confirm the decree of the Subordinate Judge in favour of the plaintiffs against those defendants, and to set aside his decree as regards the other defendants; we shall then have to remit the case in part to the Subordinate Judge, allow the plaintiffs an opportunity to make the conveyance legally admissible in evidence, and if they fail to do so, to take the chance of success upon the balance of evidence. The plaintiffs will forthwith proceed to cite the fourth and fifth defendants as witnesses, and they will be in a position to do so, with reasonable safety, as the claim of these defendants will have been finally negatived by our decree. When these defendants are examined as witnesses, the plaintiffs will be free to introduce the conveyance into evidence to corroborate or contradict them as the contingency may require. The Court will then have to reconsider the case upon practically the same evidence as has formed the basis of the decision now under appeal. No useful purpose is likely to be served by the adoption of such a course in a litigation, which has already lasted for nearly six years. We are, consequently, of opinion that in these circumstances the decree of Mr. Justice Newbould should be confirmed, and this appeal dismissed with costs.

BEACHCROFT J. I agree.

S. K. B. *Appeal dismissed.*

(1) (1911) 14 C. L. J. 578.

SPECIAL BENCH.

Before Sanderson C. J., Woodroffe, Mookerjee, Chitty and Fletcher JJ.

MOTI LAL GHOSE AND OTHERS, *In re.**

1917

June 27.

Contempt of Court—Civil and Criminal Contempt—Court of Record—Prosecution by Judges—Trial by the same Judges—Jurisdiction—Standard of proof—Fair comment—Publication—Printer, liability of—Manager and Directors of Newspaper Company, liability of—Evidence Act (I of 1872), ss. 3, 74(2)—Editor, registration of.

Where a newspaper unlawfully published articles scandalising the High Court and the Chief Justice in his administration thereof, by allegations implying that the Chief Justice had constituted a packed Bench, the articles having a tendency to prejudice the parties and interfere with the administration of justice :—

Held per CURIAM (MOOKERJEE J. discussing whether contempt proceedings were civil or criminal), that the Judges had jurisdiction to hear the Rule though issued of their own motion : that the articles constituted a contempt of Court : that the printer of the newspaper was liable therefor : that there was no sufficient evidence of the existence of an editor, that the *primâ facie* case of responsibility for the publication against two of the directors and the managers of the company owning the newspaper had been met, and that in the case of the third Director, although the facts raised a case of strong suspicion against him, it was just possible he might not be responsible for the publication and that he should be given the benefit of the doubt. The Rule was therefore made absolute against the printer, who was fined, and discharged as regards the other respondents.

The Legislature should provide for the registration of the editor or the person really responsible for the contents of a newspaper.

Per WOODROFFE J. There is only one Standard of Proof applicable alike to civil and criminal trials, *vide* definition of "proved" and "disproved" in s. 3 of the Evidence Act.

The word record includes a collection of private documents.

The Queen v. *Gray* (1), *Surendra Nath Banerjee* v. *The Chief Justice and Judges of the High Court at Fort William in Bengal* (2), *Legal*

* Rule (Special Bench).

(1) [1900] 2 Q. B. 36, 40.

(2) (1883) I. L. R. 10 Calc. 109 ; L. R. 10I. A. 171.

1917

MOTI LAL GHOSE AND OTHERS, *In re.*

Remembrancer v. *Mati Lal Ghose and Others* (1), *McLeod* v. *St. Aubyn* (2), *The American Exchange in Europe Case*(3), *St. James Evening Post Case*(4), *Daw* v. *Eley* (5), *In re Banks and Fenwick* (6), *Cheshire* v. *Strauss* (7), *Reg.* v. *Judd* (8), *Ex parte Green* (9), *Weston* v. *Peary Mohan Dass* (10) referred to.

RULE issued, by SANDERSON C. J., after consultation with the other Judges of the Court.

In August 1916, Mookerjee and Cuming JJ., sitting as a Division Bench on the Appellate Side, heard an appeal preferred by the Calcutta Improvement Trust against the decision of the Subordinate Judge of the 24-Parganas [*Trustees for the Improvement of Calcutta* v. *Chandra Kanta Ghosh* (11)] holding that the Trust had not the power to acquire surplus lands compulsorily for the purpose of recoupment.

In July 1916, Greaves J., sitting on the Original Side of the High Court, had, in three cases decided the same question in favour of the Calcutta Improvement Trust. In May 1917, the three appeals from the above judgment of Greaves J., were about to be heard by Sanderson C. J. and Woodroffe J., who were then presiding over the Appeal Court. But the Chief Justice thought it desirable to have three Judges to hear these appeals in case there was a difference of opinion and Chitty J., the next senior Judge after Mookerjee J., was selected by the Chief Justice. Before the announcement of Chitty J.'s inclusion in this Appeal Court, the *Amrita Bazar Patrika* published two articles on the 18th and 22nd May 1917, respectively, concerning the

(1) (1913) I. L. R. 41 Calc. 173.
(2) [1899] A. C. 549, 561, 562.
(3) (1889) 58 L. J. Ch. 706, 707.
(4) (1742) 2 Atk. 469.
(5) (1868) L. R. 7 Eq. 49, 59.
(6) (1869) 26 C. L. J. 401, 457.
(7) (1896) 12 T. L. R. 291.
(8) (1888) 37 W. R. (Eng.) 143.
(9) (1901) 7 T. L. R. 411.
(10) (1912) I. L. R. 40 Calc. 898.
(11) (1916) I. L. R. 44 Calc. 219.

High Court and the Chief Justice in his administration thereof. [These articles are fully set out in Sanderson C.J.'s and Mookerjee J.'s judgments in this Rule.]

This Rule was issued by Sanderson C. J. as Chief Justice of the Calcutta High Court, after consultation with the Honourable Judges of the Court and after reading the respective affidavits sworn by Mr. Hechle and Mr. Veitch, the Registrars of the Original and the Appellate Sides of the Calcutta High Court.

The Rule was directed to Tarit Kanti Biswas, the printer and publisher of the newspaper, and to Moti Lal Ghose, Golap Lal Ghose and Pijush Kanti Ghose, directors, and Golap Lal Ghose and Mirnal Kanti Ghose, the managers of the company called the "Amrita Bazar Patrika, Ltd.," having its registered office at No. 2, Ananda Chatterjee's Lane, Calcutta. The Rule called upon them to show cause why they should not be committed to jail or otherwise dealt with according to law for contempt of Court alleged to have been committed by them by unlawfully publishing the two articles concerning the High Court and the Chief Justice in his administration thereof.

Mr. Jackson and *Mr. C. C. Ghose* appeared for Moti Lal Ghose; *Mr. Eardley Norton* and *Mr. A. N. Chaudhuri* for the printer, Tarit Kanti Biswas; *Mr. B. Chakravarti*, *Mr. K. N. Chaudhuri* and *Mr. B. K. Lahiri* for Mrinal Kanti Ghose and Pijush Kanti Ghose; *Mr. C. R. Das* and *Mr. A. K. Ghose* for Golap Lal Ghose.

Mr. Jackson submitted that the Court being the complainant was incompetent to hear the Rule as Judges, citing *In the matter of a Special Reference from the Bahama Islands* (1), *In the matter of William Tayler* (2), *In the matter of Banks and*

(1) [1893] A. C. 138, 148. (2) (1869) 26 C. L. J. 345, 390.

1917

MOTI LAL GHOSE AND OTHERS, *In re.*

Fenwick (1) and other cases fully set forth in Mookerjee J.'s judgment delivered in this case. He further urged that the comment was legitimate and wanted to know if the Court was exercising its criminal jurisdiction.

Mr. Norton, without definitely offering an apology, expressed regret on behalf of the printer for any harm he may have done by his inadvertence, and asked for lenient treatment of his client, who being the printer had no way of escape.

Mr. B. Chakravarti urged that the comment was legitimate and filed two affidavits and submitted that his clients were not liable. He also discussed the duties and liabilities of directors and managers.

Mr. C. R. Das argued the question as to jurisdiction and submitted that the articles contained fair comments only and expressed confidence in the Chief Justice and the High Court.

Cur. adv. vult.

SANDERSON C.J. In this matter the Rule was issued by me as Chief Justice of this Court after consultation with the learned Judges in consequence of two articles which appeared in the *Amrita Bazar Patrika* newspaper on the 18th and 22nd of May 1917, respectively.

The Rule was directed to Tarit Kanti Biswas, the printer and publisher of the newspaper, and to Moti Lal Ghose, Golap Lal Ghose and Pijush Kanti Ghose, directors, and Golap Lal Ghose and Mrinal Kanti Ghose, the managers of the company called the "Amrita Bazar Patrika, Ltd.," having its registered office at No. 2, Ananda Chatterjee's Lane, Calcutta, and the Rule called upon them to show cause why they should not be committed or otherwise dealt with according to law for contempt of Court alleged to

(1) (1869) 26 C. L. J. 401, 457.

have been committed by them by unlawfully publishing the two articles concerning the High Court and the Chief Justice in his administration thereof.

The respondents to the Rule have all appeared by learned counsel.

The first question which it is necessary to consider is whether these articles, or either of them, constitute a contempt of Court.

The appeals from Mr. Justice Greaves to which both the articles refer are the appeals in the three cases mentioned at the head of the Rule. These cases were decided by Greaves J. sitting on the Original Side, and the appeals in which the Improvement Trust were respondents were about to be heard by the Court hearing appeals from the Original Side at the time of the publication of the two articles in May 1917.

The first article is as follows :—

"There is a mischievous rumour afloat, which should be contradicted. It is stated that a vigorous attempt is being made to get up a Bench to consider the appeal on the judgment of Mr. Justice Greaves in connection with the acquisition of surplus land by the Calcutta Improvement Trust according to somebody's choice. We do not believe that it is possible for anyone, far less the Chairman of the Trust, to secure a Bench after his own heart as a counterpoise to the Mookerjee and Cuming Bench. We are sure the interest of every rate-payer is safe in the hands of the Hon'ble Judges, and we do not think that any official of the Trust can go so far."

The reference to the "Mookerjee and Cuming Bench" is to an appeal which was disposed of by Mookerjee J. and Mr. Cuming when he was temporarily acting as a Judge of the High Court in August 1916, when the decision was against the Improvement Trust.

The second article is as follows :—

"Something like consternation prevails on account of the proposed new constitution of the Appellate Bench of the Calcutta High Court before which appeals against the awards of the Improvement Trust are to be heard. It is known to the reader how this Bench was originally composed of Sir Asutosh

1917

MOTI LAL GHOSE AND OTHERS, *In re.*

SANDERSON C.J.

Mookerjee and the Hon'ble Mr. Justice Cuming, and how latterly it has come to be presided over by the Hon'ble the Chief Justice and Mr. Justice Woodroffe. Rumour has it that for purposes of hearing Improvement Trust appeals the Bench is going to be strengthened by the appointment of Mr. Justice Chitty. Now what neither the public nor ourselves can understand is this special arrangement for such a Special Bench. If it is contended that two Hon'ble Judges of the highest Court in the land are not competent to decide in appeal cases in which the Improvement Trust is concerned—a contention, however, which we do not believe the Chief Justice will care to advance—why should there be a Special Bench of three and not a Full Bench of five, on which at least two Indian Judges could find seats? As a matter of fact, as landowners in Calcutta are mostly Indians, and as Indian Judges are likely to know more of conditions, practices, etc., prevailing here, it is but meet that the Appellate Bench in the present circumstances should be so composed as to associate Indian Judges with their European colleagues. The withdrawal of Sir Asutosh has given rise to rather unsavoury impressions in the public mind, since this proposed arrangement is to follow close upon the heels of his judgment in the case of *Trustees for the Improvement of Calcutta* v. *Chandra Kanta Ghosh* (1). Be that as it may, we have perfect faith in the present Chief Justice and believe that as soon as Sir Lancelot Sanderson understands the public feeling in the matter, his Lordship will either form a Full Bench or at least associate an experienced Indian Judge with himself for the hearing of Improvement Trust Appeals."

It was admitted by the learned counsel for the respondents at the hearing of the Rule that the statements of facts contained in this article were in many material respects untrue. There was not an Appellate Bench constituted to hear "appeals against the awards of the Improvement Trust" as the article assumes—such Bench was not originally composed of Mookerjee and Cuming JJ. as stated in the article: such Bench had not latterly come to be presided over by the Chief Justice and Woodroffe J., and it is untrue that Mookerjee J. had been withdrawn from the Court.

Though these admissions have been made it may be advisable to state the real facts.

In August 1916, as already stated, Mookerjee J. and

(1) (1916) I. L. R. 44 Calc. 219.

Mr. Cuming were sitting as a Division Bench on the Appellate Side and an appeal by the Improvement Trust from the Subordinate Judge of the 24-Pargannahs having come before them in the ordinary course, was disposed of by them. One of the questions was the alleged power of the Improvement Trust to acquire land compulsorily for the purpose of recoupment and the decision was against the Improvement Trust.

In July 1916, Greaves J, sitting on the Original Side, had decided the same question in three cases in favour of the Improvement Trust, and in May of this year the appeals from Greaves J.'s judgment in the three cases were about to be heard by Woodroffe J. and myself, the Judges who were then taking the appeals from the Original Side. Under these circumstances the articles were published.

As regards the inclusion of Chitty J. in the Court, no explanation is necessary : it would be sufficient for me to state that I, as Chief Justice, thought it desirable to have three Judges to hear the appeal. But the reason in this case must have been obvious to every one.

It was within my knowledge, as it was within every one's knowledge, that Mookerjee J. had decided one way and Greaves J. decided another way on a construction of the Act on which the cases depended. It was obviously, therefore, a matter on which difference of opinion was possible: moreover, it was a case of general importance and in order to avoid a further disagreement which might occur if the Court was constituted of two Judges only, and to avoid the further proceedings and delay which would undoubtedly be consequent on such a disagreement, I thought it advisable to have three Judges instead of two, and, accordingly, I requested Chitty J., the next Judge in order of seniority, who had not already had the matter before

1917

MOTI LAL GHOSE AND OTHERS, *In re.*

SANDERSON C.J.

him, to sit with Woodroffe J. and myself, and hear the appeals. I may mention here that in my opinion all appeals from a Judge sitting on the Original Side, except interlocutory appeals, should be heard by a Court constituted by three Judges, and when I first sat in this Court it was so constituted: but I found that the allocation of three Judges to that Court dislocated the work in other departments of the Court so much that I came to the conclusion, with much reluctance, that with our present staff of Judges I could not allocate more than two Judges to the Original Side appeals, except in special cases.

These being the facts, I now proceed to consider whether the articles are a contempt of Court.

I take the definition given by Lord Russell of Kellowen in *The Queen* v. *Gray* (1) at page 40. "Any act done or writing published calculated to bring a Court or a Judge of the Court into contempt, or to lower his authority, is a contempt of Court. That is one class of contempt. Further, any act done or writing published calculated to obstruct or interfere with the due course of justice, or the lawful process of the Courts, is a contempt of Court. The former class belongs to the category which Lord Hardwicke L. C. characterised as 'Scandalising a Court or a Judge.' That description of that class of contempt is to be taken subject to one and an important qualification. Judges and Courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court could or would treat that as contempt of Court. The law ought not to be astute in such cases to criticise adversely what under such circumstances and with such an object is published, but it is to be

(1) [1900] 2 Q. B. 36, 40.

remembered that in this matter the liberty of the press is no greater and no less than the liberty of every subject of the Queen."

With regard to the first article I have no doubt it constitutes a contempt of Court. It was admitted by the learned counsel appearing for the Printer and Publisher that it was a gross libel upon the Improvement Trust, one of the litigants. It alleges that it is stated that a vigorous attempt is being made to get up a Bench to consider the appeal on the judgment of Greaves J. in connection with the acquisition of surplus land by the Calcutta Improvement Trust according tosomebody's choice, which Bench is referred to thereinafter "as a counterpoise to the Mookerjee and Cuming Bench," which, as I have stated, had decided against the Improvement Trust. It was urged that this should not be regarded as a contempt, because the matter which would be argued on the appeals was the construction of an Act, and would be decided by Judges who would not be affected by such remarks.

The question is not whether the article in fact obstructed or interfered with the due course of justice, but whether it is "calculated" to obstruct and interfere with the due course of justice. No matter what the tribunal may be, I am at a loss to understand how it can be seriously argued that such a grave allegation against one of the litigants, that he was attempting to get a Bench constituted in such a way as would in his opinion give him a favourable decision, is not calculated to obstruct or interfere with the course of justice.

Further, the mere suggestion that such a thing is within the bounds of possibility is a grave reflection upon the Court and the persons responsible for its administration.

I am not unmindful of the argument that the article refers to a "mischievous rumour which should

1917

MOTI LAL GHOSE AND OTHERS, *In re.*

SANDERSON C.J.

be contradicted" and that confidence is alleged in the Hon'ble Judges. The fact that the article is based on a rumour, even if it existed, cannot, in my judgment, excuse the publication of it. It must have been known to the person responsible for the publication that it was absolutely impossible for a litigant to get a Bench constituted according to his own choice. It is, however, a well-known method of spreading a libel for the publisher, who does not wish to take responsibility for it, to say there is a rumour to this or that effect, but that he himself does not believe it. It was admitted by one of the learned counsel for the respondents that some words may have been inserted in the article by the person responsible therefor in order to protect himself in case of emergency, and having regard to the whole tenor of the article, I have very little doubt that this was the object of the writer in concluding in the manner referred to. If the matter had stopped there, although the paragraph was reprehensible and a clear contempt of Court, it might not have been necessary for the Court to take any steps of its own motion.

The second article, however, appeared four days later on the 22nd May. As already mentioned the facts therein stated are admittedly untrue, and consequently the insinuations based thereon are equally groundless. The only part of the article which is based on an alleged rumour is that Chitty J. was to be appointed to the Bench which was to hear the Improvement Trust Appeals. For the rest of the statements in the article the author makes himself responsible.

The statement that "something like consternation prevails on account of the proposed new constitution of the Appellate Bench," taken by itself is a grave allegation. Why should a Bench which is to be composed of the Chief Justice and two of the most

experienced Judges of the Court, cause consternation? But when it is taken with what follows it assumes a much more serious complexion. After misstating the facts as to the previous constitution of the Bench and referring to the proposed inclusion of Chitty J., it proceeds "now what neither the public nor ourselves can understand is this special reason for such a Special Bench." It then proceeds to argue that the proper thing would have been to have a Full Bench on which at least two Indian Judges could have seats. Reading so far, there may be some reason for doubt as to the meaning of the article, though the above allegations go the length of alleging that for some reason, which no one could understand, the Chief Justice was about to include Chitty J. in the Bench, and that such constitution of the Bench had caused something like consternation. But I think all doubt is set at rest by what follows when the author makes himself responsible for the statement that Mookerjee J. has been withdrawn from the Bench, and that such withdrawal "has given rise to rather unsavoury impressions in the public mind, since this proposed arrangement is to follow close upon the heels of his judgment in the case of *Trustees for the Improvement of Calcutta* v. *Chandra Kanta Ghosh* (1)." Reading that in the ordinary way, can it mean anything except that Mookerjee J. has been withdrawn from the Bench taking the appeals against the awards of the Improvement Trust; that such Bench was originally composed of Mookerjee J. and Cuming J.; that it is now composed of the Chief Justice and Woodroffe J.; that Chitty J. is about to be included which is a special arrangement which neither the author of the article nor the public can understand; that if any special arrangement is

(1) (1916) I. L. R. 44 Calc. 219.

1917

MOTI LAL GHOSE AND OTHERS, *In re.*

SANDERSON C.J.

necessary, why should not Indian Judges be included, and that the withdrawal of Mookerjee J., coming as it does so soon after his judgment against the Improvement Trust, has caused an unsavoury impression in the public mind. Consequently something like consternation prevails at the proposed new constitution of the Bench.

I think it is clear that it means that Mookerjee J. has been withdrawn from the Bench taking the appeals against the awards of the Improvement Trust and insinuates that it is because of his judgment against the Trust, and therefore an unsavoury impression has arisen. I fail to see any other meaning which can be attributed to it, and I have no doubt that this article, read by itself, constitutes a very serious reflection upon the administration of the Court, which every one knows is in the hands of the Chief Justice. But if it is read in conjunction with the previous article, the above-mentioned meaning is made plain beyond dispute. I think the articles should be read together. They were published with only four days interval, they refer to the same subject-matter, they are written in the same strain and in the same style, and each article appeared in the columns of the Newspaper which are devoted to leading articles. When read together, what do they mean? It is obvious to my mind they mean to suggest that a vigorous attempt had been made by the Improvement Trust to secure a Bench composed according to their choice, and that the attempt had succeeded; that otherwise the proposed constitution of the Bench is inexplicable and something like consternation prevails. If this be the correct meaning, there is no doubt that it is calculated to bring the Court and the Chief Justice, who is responsible for its administration, into contempt, it is calculated not only to destroy confidence in the

Tribunal but also to undermine and impair the authority of the Court. If so, there is no doubt that it is a contempt of this Court.

There are two other matters to which I wish to refer. It was argued that the object of the second article was to procure the appointment of two Indian Judges or one Indian Judge to the Bench which was to hear the appeals, and the suggestion contained in the article was that as the land-owners in Calcutta were mostly Indians, and Indian Judges are likely to know more of the conditions and practices prevailing, it was but meet that Indian Judges should be associated with their European colleagues. The question at issue in the appeals depended on the construction of the sections of a certain Act and had nothing to do with the conditions and practices, etc., relating to Indians. This, however, might be put down to ignorance on the part of the author of the article, though from the references made in the article to such matters as the constitution of the Courts, Full Bench and other matters, the writer appears to be fairly familiar with the proceedings of the Court and the nature of the appeals in question. A further argument, however, was adduced by the learned counsel for Moti Lal Ghose, viz., that the real object of the article was to get an Indian Judge, who possessed land, appointed to the Bench in question, because Indian Judges would approach the subject from a totally different point of view from that of European Judges, who do not possess land and who do not know where the shoe pinches. This to my mind was an astonishing argument. I was not surprised, therefore, that Mr. C. R. Das, appearing for another of the respondents at a later stage of the hearing, disassociated himself from that argument and stated that in his opinion the above-mentioned argument would be the

1917

MOTI LAL GHOSE AND OTHERS, *In re.*

SANDERSON C.J.

strongest ground for suggesting that Indian Judges should not be on the Bench in question.

Assuming, however, that the learned counsel for Moti Lal Ghose was correct in his statement as to the meaning and object of the article, it is not only one which would be rightly and strongly resented by my Indian colleagues, but it also provides an additional reason for holding the article a contempt of Court: for it involves the suggestion that one of my Indian colleagues should be added to the Bench in question because he possessed land and would approach the question from a different point of view from a Judge who possessed no land, and who would therefore be entirely independent, and it thereby constitutes a very grave and unjustifiable reflection on my Indian colleagues.

It is also to be noted that if this was the object, the author of the articles was endeavouring to obtain the constitution of a Bench after his own heart, the very thing which he had professed to condemn so strongly when attempted, as alleged, by the Improvement Trust. Assuming, however, that the object of the article was to get an Indian Judge appointed, no matter for what reason, that does not justify the publication of the untrue statements of facts and the unworthy and groundless insinuations based thereon.

The other matter to which I refer is the passage at the end of the article in which the author expresses perfect faith in the Chief Justice. This, to my mind, is so inconsistent with the insinuations previously made in the articles, that it is impossible to conceive that it was genuinely intended. It is much in the same style as the conclusion of the previous article, and I do not think there can be any doubt as to the object of the author in using these words, *viz.*, to try and provide a means of escape for himself if he is

taken to task for the previous matter contained in his article.

No one has come forward to acknowledge the authorship of the articles or the responsibility of the publication, and we have, therefore, had no opportunity of hearing or considering any explanation from the individual, in person, who was so responsible. Consequently, the meaning and the intention of the writer must be gathered from the articles themselves. They must be read as they stand, giving to the words used their natural meaning. We have had many arguments and many commentaries upon the articles addressed to us by all the learned counsel on behalf of the respondents. I have considered them carefully, and, though I should like to have come to the conclusion that the articles do not and were not intended to constitute an attack on the Court, I regret to say I am unable to come to that conclusion. It might possibly have been different if the author of the article or the person responsible for its publication had come forward and personally explained what was in his mind; but he has not chosen so to do, and we must construe the articles as they stand and I have no doubt that any one reading them would come to the conclusion that a very serious aspersion was cast upon the Court and the administration thereof, and that consequently they do constitute a contempt.

If then the articles constitute a contempt, the next question is whether the Court has jurisdiction to deal with it by these proceedings. There can be no doubt as to this; it was held in 1883 in *Surendra Nath Banerjee* v. *The Chief Justice and Judges of the High Court at Fort William in Bengal*(1) by the Judicial Committee that the High Courts in the Indian Presidencies are Superior Courts of Record. The

(1) (1883) I. L. R. 10 Calc. 109.

1917

MOTI LAL GHOSE AND OTHERS, *In re.*

SANDERSON C.J.

offence of contempt of Court and the powers of the High Court to punish it are the same in such Courts as in the Superior Courts in England, and the jurisdiction was exercised by the High Court in that case.

The jurisdiction was affirmed in 1913 in the case of *Legal Remembrancer* v. *Matilal Ghose and Others* (1). Sir Lawrence Jenkins C.J. said at page 216, "Now this Court is a Court of Record in all its jurisdictions and it thus has power to commit for any contempt in relation to any of those jurisdictions."

Then Mookerjee J. at page 242 said:—

"Now it is indisputable that a Court of Record has authority to punish for contempt. Sir Barnes Peacock C.J. observed in *In re Abdool and Mahtab* (2) that this Court, by the express terms of the Letters Patent, is a Court of Record and there can be no doubt that any Court of Record has the power of summarily punishing for contempt"; and indeed the learned counsel appearing for the printer and publisher of the newspaper admitted the jurisdiction of the Court, but argued that in this case it should not be exercised. The suggestion that this jurisdiction is obsolete and ought not to be exercised, is futile in view of the fact that it was exercised by this Court in 1883 and affirmed to be in existence in 1913. It was also exercised in England as recently as 1900 in the case of *The Queen* v. *Gray* (3) already referred to.

The question remains then whether the Rule should be made absolute against the respondents or any of them.

As regards the case of Tarit Kanti Biswas, the first respondent on the record, there is evidence that he was the printer and publisher of the newspaper. We have before us a certified copy of the return made

(1) (1913) I. L. R. 41 Calc. 173, 216, 242. (2) (1867) 8 W. R. Cr. 32.
(3) [1900] 2 Q. B. 36, 40.

by him under Act XXV of 1867, his name appears in the newspaper as printer and publisher and he has himself put in an affidavit admitting that he occupies such position and that he printed and published the articles in question.

As already stated his learned counsel admitted the jurisdiction of this Court and further admitted his legal responsibility if the articles constituted a contempt. This responsibility could not be denied, for it has been held in many cases that the printer and publisher is liable for contempt even though he was not aware of the subject constituting such contempt, and the reason for that is given by Lord Morris in *McLeod* v. *St. Aubyn*(1), as follows:—"A printer and publisher intends to publish and so intending cannot plead as a justification that he did not know the contents." Again it was pointed out by Stirling J. in *The American Exchange in Europe*(2) that the foreman printer (who was the person concerned in that case) is the person who is held out to the public as the publisher, and under those circumstances he is answerable for publishing the article complained of, although he is ignorant of its contents. This has been the law since the well-known decision of Lord Hardwicke in the case of *St. James Evening Post* (3).

I refer to the above-mentioned cases to show that in my judgment the learned counsel was correct in making the admission that this Court has jurisdiction in these proceedings and that if the articles constitute a contempt of Court, the printer and publisher is legally liable in respect thereof.

Having held that the articles are a contempt, it remains to be considered whether the Rule should be made absolute. The printer and publisher has put

(1) [1899] A. C. 549, 562. (2) (1889) 58 L. J. Ch. 706, 707.
(3) (1742) 2 Atk. 469.

1917

MOTI LAL GHOSE AND OTHERS, *In re.*

SANDERSON C.J.

in an affidavit in which he alleges he did not read the articles when they were handed to him for publication which was done in the ordinary course of his business. He admits that certain statements in the second article are incorrect, and he then proceeds to argue that the publication was in the public interest. His affidavit runs thus :—

"6. That I further state that the said articles were published by myself in good faith and in the public interest and without any intention whatsoever of offending against the dignity or integrity of this Hon'ble Court or of prejudicing the due course and administration of justice in the matter of the appeals referred to in the said articles."

"7. That long before the appeals referred to in the said article came on to be heard by this Hon'ble Court, it was well-known among the public of Calcutta how the Calcutta Improvement Trust had objected to the hearing of the appeal in which the question of the powers of the Calcutta Improvement Trust was involved by any of the Indian Judges of this Hon'ble Court and how, as a matter of fact, they through their counsel Mr. Langford James adopted the very unusual course of applying in open Court to the Hon'ble the Chief Justice that the appeal case of *The Trustees for the Improvement of Calcutta* v. *Chandra Kanta Ghosh* (1) should not be heard by the Hon'ble Mr. Justice Mookerjee, and how after the decision in the last mentioned case by the Hon'ble Mr. Justice Mookerjee and the Hon'ble Mr. Justice Cuming they had unsuccessfully applied to Government for legislation for the purpose of doing away with the effect of the said decision. In the circumstances recited the public were watching with deep interest the action of the Hon'ble the Chief Justice in constituting the Court which would hear the appeals from Mr. Justice Greaves' decision."

"8. I further state that the said articles were published to give expression to public feeling in Calcutta, and, as stated above, without the remotest intention of scandalising this Hon'ble Court or of reflecting on the conduct of the Hon'ble the Chief Justice or of any other Judge of this Hon'ble Court."

If it be true that the public were watching with such deep interest the action of the Chief Justice in constituting the Court, it seems to me that fact enhances the serious nature of the publication of the articles. For the public in the ordinary course might

(1) (1916) I. L. R. 44 Calc. 219.

not trouble its head about the constitution of the Court and might not pay much attention to the articles; but if, on the other hand, the public really was interested in the matter, it would pay attention to them, and it was all the more incumbent upon the author and publisher to abstain from making false statements and groundless insinuations. I may have my doubts as to the "deep interest" alleged in the affidavit, but if it did exist the seriousness of the publication is greatly increased.

The learned counsel for the printer and publisher urged that his client would be sufficiently dealt with by the proceedings which had been taken and that the Rule should not be made absolute against him. I take into consideration all that the learned counsel urged and I sympathise with his argument that the editor, if there be one, or the person responsible for the publication, ought in common fairness to have come forward and borne the burden in respect thereof; the fact that the printer and publisher does not disclose the name of the person responsible for the publication is a factor to be considered when deciding how the printer and publisher should be dealt with. In this case, the printer and publisher has not disclosed the person responsible for the publication, whom of course he must know, though he may not know the actual writer of the articles. On the contrary he has attempted to justify the publication by the paragraphs of his affidavit to which I have referred. It was said by Lord Hardwicke in the case already cited [*St. James Evening Post* (1)] "Nothing is more incumbent upon Courts of justice than to preserve their proceedings from being misrepresented:" and the reason for this must be obvious to every one. My attention has been drawn on other

(1) (1742) 2 Atk. 469.

1917

MOTI LAL GHOSE AND OTHERS, *In re.*

SANDERSON C.J.

occasions to articles criticising the High Court. I have found that many of them were unjustifiable, because they were based on statements of facts which were incorrect; but the Court has not taken any notice of them because they were not worth the time of the Court. But this is a different matter, the allegations contained in the articles exceed the bounds of any legitimate criticism and strike at the very root of the administration of justice.

People who are familiar with the administration of the Court would know how impossible the allegations were, but among people who are not so familiar with the Court's administration, such articles as those in question with their groundless insinuations may be very mischievous and pernicious They contain grave misrepresentations of the proceedings and administration of this Court, and in my judgment we should be failing in our duty if we did not take such steps as are within our power to counteract the effect of them and to vindicate the Court and its authority.

In my judgment, therefore, the Rule should be made absolute against Tarit Kanti Biswas, the printer and publisher.

As regards the other four respondents, the evidence before us, apart from the question of its admissibility on the technical grounds which were put forward during the argument, raised a strong *primâ facie* case that they were responsible for the publication of the newspaper containing the articles.

"The Amrita Bazar Patrika Co., Ltd.", was incorporated in 1908, the original directors being Sisir Kumar Ghose, Moti Lall Ghose and Golap Lal Ghose, for the purpose of acquiring and taking over as a going concern the business of newspaper proprietors, printers and publishers then carried on, and in connection therewith the entire rights including the goodwill

of the newspaper called the *Amrita Bazar Patrika* then being published from No. 2, Ananda Chatterjee's Lane, in Calcutta and all or any of the assets and liabilities of the proprietors of the business in connection therewith and with a view thereto to enter into the agreement referred to in clause 3 of the company's Articles of Association and to carry the same into effect with or without modification, with the usual subsidiary powers contained in the Memorandum of Association.

The company gave the statutory notices that it intended to carry on its business at No. 2, Ananda Chatterjee's Lane, which was to be deemed its registered office: that it possessed a printing press at Nos. 19 and 20, Bagbazar Street, which the Company purchased from Golap Lal Ghose. On the 5th March 1917 the respondents Moti Lal Ghose, Golap Lal Ghose and Pijush Kanti Ghose were the directors. Golap Lal Ghose and Mrinal Kanti Ghose were the managers, and it further appeared that Golap Lal Ghose acted as financial manager and Mrinal Kanti Ghose as secretary. The address of all the four was given as No. 2, Ananda Chatterjee's Lane. The Articles of Association (which were put in evidence by M. K. Ghose) provided that the business of the company should be managed by the directors who might pay all expenses incurred in getting up and registering the company and might exercise all such powers as are not by the Indian Company's Act required to be exercised by the company in general meeting, subject to the provisions of the Act and of the Articles, etc.

It was obviously a family business converted into a limited company. This is confirmed by the list of persons holding shares exhibited in Mr. Hechle's affidavit. The evidence shows that the directors and managers were living at the premises which are the

1917

MOTI LAL GHOSE AND OTHERS, *In re.*

SANDERSON C.J.

registered office of the company; that the newspaper was published at those premises; that it was the duty of the directors to manage the business; there was no editor disclosed or any other person occupying a position similar to that of an editor who would be responsible for the publication and the contents of the newspaper.

From these facts it would naturally be presumed that these respondents were actually engaged in the management of the newspaper and personally responsible for its publication: these directors were occupying positions, very different from those generally occupied by directors of companies, whose duties are restricted to attending periodical meetings and directing the policy of the company.

Two of the respondents, Pijush Kanti Ghose and M. K. Ghose, however, have put in affidavits, and it appears therefrom that M. K. Ghose was away from Calcutta on private business at the time when both the articles in question were published and that P. K. Ghose was away on private business when the second article was published, and under these circumstances I think that the *primâ facie* case against them may be said to have been met, and I do not think that either of them should be held responsible in these proceedings for the publication and that consequently the Rule should be discharged as against them.

There are, therefore, two directors left to manage the business of this newspaper at the material times, *viz.*, Moti Lal Ghose and Golap Lal Ghose. G. L. Ghose in the evidence is described as director and manager and also as financial manager. M. K. Ghose has sworn that Golap Lal Ghose has only to do with the receipts and disbursements of the company and keeps the account thereof.

Under these circumstances, I think, the *primâ facie*

case made against him may be rebutted, and that he should not be held responsible in these proceedings for the publication of the articles, even though it is not alleged that he was not at the premises when the paper was published at the material times, and in my judgment the Rule should be discharged against him.

With regard to Moti Lal Ghose, the case is different. I think, under the circumstances mentioned above, it may not unreasonably be presumed that he was responsible for or privy to the publication. It was the director's duty to manage the business: such business was the publishing of the newspaper. One of the three directors was away from Calcutta, another, it is shown, had only the financial matters to attend to; Moti Lal Ghose, therefore, is the only director to whom the particular duty of editing and publishing the newspaper can be ascribed. As already mentioned his was not the position of an ordinary director who makes periodical visits to the company's premises at stated and regular intervals. He was living on the premises where the paper was published, and carrying on the family business which had been turned into a limited company.

There is no editor disclosed, and even in the affidavits which have been put in by Pijush K. Ghose and Mrinal K. Ghose there is no specific reference to any editor. There is a general statement only, *e.g.*, the affidavit by P. K. Ghose runs as follows :—"Neither I nor my co-directors exercise any control whatever over the contents of the *Amrita Bazar Patrika* newspaper, but we perform such duties and exercise such powers as are mentioned and defined in the Articles of Association of the limited company." This is not a convincing statement. It is to be noted that it does not go the length of saying that the directors did not know of, or were not privy to, the publication of the

1917

MOTI LAL GHOSE AND OTHERS, *In re.*

SANDERSON C.J.

articles; if they did know of the inclusion of the articles and allowed the newspaper containing the articles to be published, they would be responsible.

Further, the main duty of the directors "mentioned and defined in the Articles of the company" is to manage the business of the Company, which business is the publication of the newspaper.

Under such circumstances the natural presumption would be, I think, that M. L. Ghose either was responsible for, or at all events, was privy to the publication of the articles. But it has always been held that the jurisdiction which the Court has in respect of a contempt of Court should be exercised with great care and should only be exercised when the case is beyond all reasonable doubt, and this should specially be the case when the proceedings are at the instance of the Court itself. Moti Lal Ghose has made no affidavit nor has he offered any explanation of his position in connection with the newspaper at No. 2, Ananda Chatterjee's Lane, and if the above-mentioned presumption of responsibility were drawn against him, I do not think he could complain. But I think it is just possible that he may not have been responsible for or privy to the publication of the article. Although no reference is made to the existence of an editor, or some person in the position of an editor, it is still possible that there may be one who is not before the Court. For there is the general statement by Pijush K. Ghose and M. K. Ghose made on oath, that the directors do not exercise control over the contents of the newspaper. Though this general statement be unsatisfactory it cannot be wholly disregarded and it may be that the general control as to the contents of the newspaper may be vested in the hands of some person who occupies the position of an editor, and who, for reasons known only to the respondents, has not been

disclosed, and that consequently these articles may have been inserted without the responsibility or knowledge of M. L. Ghose. It is not likely that this was so, but still it is *just possible* and having regard to the principle that in proceedings of this nature we should be scrupulously careful to see that the case is clear beyond all reasonable doubt, I think Moti Lal Ghose should be given the benefit of that doubt and that the Rule should not be made absolute against him.

In view of the attitude taken up by the respondent directors we considered whether a Rule should not be issued against the company itself with respect to which the considerations which affect the positions of the directors would not arise; but in view of the fact that the object of the proceedings, *viz.*, the vindication of the Court and its authority, had been obtained by the proceedings already instituted, we came to the conclusion that it was not necessary to take up the time of the Court by adding the company, which would have necessitated a further hearing.

Before leaving the case of the directors, I desire to refer to the attitude adopted by them. If the articles were innocently intended, the natural thing would have been for the person responsible for them, or for their publication, to come forward and declare his intention: on the other hand, even if they were not innocently intended, one would have expected the person really responsible for their publication to come forward and take the responsibility on his own shoulders, as was done in the case of two well-known newspapers in Calcutta on previous occasions [*The Englishman Case* (1) and *The Bengalee Case* (2)]. They have chosen

(1) (1869) 26 C. L. J. 401, 457.

(2) (1883) I. L. R. 10 Calc. 109; L. R. 10 I. A. 171.

1917

MOTI LAL GHOSE AND OTHERS, *In re.*

SANDERSON C.J.

not to do so, but to leave the printer and publisher to bear the brunt of the matter.

It is further to be noted that although it was evident that the Court, by issuing the Rule, regarded this as a matter reflecting upon the Court, although it has been admitted that the second article contained statements of fact which were entirely untrue, and consequently that the insinuations based thereon were groundless, although two of the respondent's learned counsel admitted that the article, to say the least of it, was a piece of great impertinence, not one word of apology has fallen from the directors of the company.

As regards the many technical points raised by the learned counsel as to the admission of the evidence, I do not think it is necessary for me to discuss them: none of them affect the case of the printer and publisher. I would only say that I have had the opportunity of reading Woodroffe J.'s judgment, and I agree with him that most of them were trivial and unsubstantial. The Court was occupied over these proceedings for 2½ days. Some part of the time no doubt was taken up by the discussion of the meaning of the articles, but the greater part was devoted to technical objections relating to the evidence and to the question as to who was really responsible for the publication. This fact shows how essential it is that the Legislature should provide for the registration of the editor, or the person really responsible for the contents of a newspaper, so that the responsibility might be placed in the proper quarter without any difficulty or delay.

For the above-mentioned reasons, in my judgment, the Rule should be made absolute against Tarit Kanti Biswas, the printer and publisher, and it should be discharged as against the other respondents.

WOODROFFE J. The argument before us (other than those of Mr. Norton for the printer) would suggest that the parties regarded this Rule as an opportunity for a legal *tamasha*, to use an expressive if not judicial term, rather than as a proceeding taken in the public interest to ascertain the true facts. Divorced from the lengthy and unnecessary discussions before us and freed of obstructive tactics, the matter is really quite a simple one and might have been decided with but little delay. In that case too our judgments might have been short, but the exuberant argument calls for some answer.

The parties before us are the directors, managers, and secretary of the "Amrita Bazar Patrika, Ld.," a small company, seemingly a family business, which owns and runs a Calcutta newspaper called the Amrita Bazar Patrika. With them is joined their printer. Ordinarily, of course, a newspaper has an editor, but this company (or some of its members) has been very secretive on the question whether there is an editor, and, if so, who he is. This is not the first time that the editor, if there be one, has been kept in the background. Perhaps it was considered that such secrecy was a convenient policy in defence of proceedings against the paper. Whatever be the object, these persons have so far successfully concealed the fact and name of their editor. In the present proceedings it was not unreasonable for the Court to think that a summons to the directors, managers and secretary was sufficient without notice on the company, and that the officers of the company would disclose the actual facts. What actually occurred at the trial has shown that no assistance can be expected from the company's officers, and on a future occasion it will be necessary to consider whether the Court should not proceed against the company and its property. Such

1917

MOTI LAL GHOSE AND OTHERS, *In re.*

WOODROFFE J.

difficulties as we have experienced would be remedied were a law enacted compelling the registration of the names of editors just as the English Newspaper and Registration Act, 1881 (44 and 45 Vict. c. 60), compels the registration of the names of the proprietors. As the Court was not in possession of evidence whether there was an editor, or who he was, proceedings were instituted against those persons who are empowered to manage the business of the company and against its printer.

On the 18th and 22nd May last two articles appeared in this newspaper which seemed to the Chief Justice, in consultation with the Judges of the Court, to be a contempt. The writer circulates what he calls "mischievous rumours" and "unsavoury impressions" and makes statements which suggest that a litigant before the Court, namely, the Calcutta Improvement Trust, had been successfully intriguing to get a Bench of its choice to hear an appeal from the decision of Greaves J. As such an intrigue could not succeed without the connivance of the Court such a statement was scandalising the Court as it is technically called. Next, as the allegation of such an intrigue touches the party said to be carrying on this intrigue the tendency of such writing is to prejudice that party. Thirdly, the articles are calculated to interfere with the administration of justice, for the writer seeks to do, though in his own way, what he complains of in the case of the litigant Trust, namely, to influence the Chief Justice to form a Bench to hear the appeal in question, the Bench to be of such composition as the writer approved. As it seemed to the Court that *primâ facie* a contempt had been committed, a Rule was served upon the persons mentioned to show cause: that is, they were given the opportunity of showing that the articles were not contemptuous,

and if they were, that they were not responsible for them.

The parties whom we called for have come before us. Leaving aside the printer, their substantial contention (to be extracted from the general mass of objections and arguments) is that the business in which they are each engaged has nothing to do with the control of the contents of the paper; that is, their work is not of an editorial character. One of them swears that he was out of Calcutta when both the articles were published, and another that he was away from Calcutta when the second and chief article appeared. The printer says that he has no control of the contents of the paper and that he printed what was given him without first reading it. Two parties, Moti Lal Ghose and Golap Lal Ghose, have filed no answer at all. All parties have refused to state whether there is an editor, but they all contend that we are quite mistaken in supposing that the articles are a contempt. On the contrary, we are told that the writer of these articles was a man who had perfect faith and confidence in the Chief Justice and Judges; that he was solicitous for their honour and was only seeking to protect and counsel the Court from and in respect of certain "mischievous rumours" and "unsavoury impressions". In short, he was the Court's benefactor who thought that if it would but follow his advice as to how it should conduct its business, it would escape the "unsavoury" imputations which the public were making against it. This was said by some of the learned counsel to be so clear that Mr. Jackson affirmed that no case could be found in all the reports which approached the present one in the weakness of the alleged contempt. If there be anything in all this, what should the parties have done? Each of the directors should have put in an affidavit exculpating

1917

MOTI LAL GHOSE AND OTHERS, *In re.*

WOODROFFE J.

themselves from being privy to the publication. The reading and examination of these affidavits might have taken half an hour. If these affidavits were accepted as truthful and the editor had been named, these parties other than the printer would have been discharged within about half an hour of their appearance before us, instead of, as now, after a protracted argument for three days. We should have then expected that the parties would have named and produced their editor the more particularly that the articles for which he would have been responsible are alleged to be of a wholly innocuous character and their author to be one who cherishes the honour of this Court and would be its adviser and protector. But, strange to say, this man of alleged good and disinterested motives is not named or produced. What had he or the parties to fear, assuming that their argument as to the meaning of the articles is correct? Can it be said that notwithstanding such excellent intentions he was yet afraid that we might deal with him unjustly? If so, the writer's professions of his perfect faith and confidence in the Court are a pretence. If he had come here and had explained what notwithstanding the form of his expression he actually meant; if he had come here and said (as has been suggested by others in his absence) that he gave no credence to these rumours, that he personally made no suggestion against the Court, which in fact he was seeking to counsel and protect; if, I say, he had satisfied the Court of his innocence, then he too would have been discharged, and necessarily with him the printer. As a fact, the position taken up before us is "We refuse you all information. Prove what you can against us." such affidavits as have been put in show that they have been elaborately drawn so as to keep out information.

If, as is my opinion, there is a case made out calling for an answer, it is obvious that the non-disclosure and non-production of the editor or writer leads to the inference that he or they are withheld because upon a true construction of the articles, they do in fact constitute a contempt and that there is no reality in the argument which would have us hold that there was no contempt at all. If so, why all this secrecy and technical objections as to jurisdiction, procedure, nature of contempt, evidence and so forth?

It is first objected that we have no jurisdiction; and if we have, and if there was a contempt, the affidavits issued with the Rule do not make any case calling for an answer; and if it did call for an answer on the assumption that the articles constituted a contempt, they are not a contempt in fact, and lastly, if they do constitute a contempt, two of the parties were not in Calcutta at the time of the publication of one or both of the articles.

As regards jurisdiction, a number of stale objections were taken. It is not necessary to go into the history and nature of contempt. It is too late now to contend that we have no other jurisdiction than that conferred by the Indian Penal Code, or that in exercising this jurisdiction we are Judges in our own cause. The jurisdiction has been approved many years ago by, amongst other Judges, their Lordships of the Privy Council. The second observation applies to all cases of contempt, and if it were given effect to, the Court would be deprived of its jurisdiction in every case. In the present one the Court, as it is entitled to do, issued the Rule of its own motion. The Court however in such cases does not seek to vindicate any personal interests of the Judges, but the general administration of justice, which is a public concern. It is not a fact that proceedings for contempts by scandalising the

1917

MOTI LAL GHOSE AND OTHERS, *In re.*

WOODROFFE J.

Court are obsolete as Mr. Jackson argued. There are moreover special reasons in this country why this jurisdiction should be maintained which I need not here develop. I may however refer in this connection to the observations in *McLeod* v. *St. Aubyn* (1). The point of jurisdiction has been laboured with a view to establish the point that the case before us should be decided as a criminal one. It is what is called a "criminal" contempt, but all proceedings, whether in respect of civil or criminal contempts, are, in my opinion, of a criminal nature where and in the sense that they are *in poenam*, that is when their object is to punish by fine or imprisonment. It does not however follow that the procedure in such cases is in all respects the same as in an ordinary criminal case. It is obviously not. For if it were, the parties before us would have been in the dock and (not to speak of other matters) no affidavits could have been filed by or against them. In fact both the offence as also the jurisdiction and procedure under which it is tried are *sui generis*. As regards the question of proof, no case, either civil or criminal, should be tried and determined otherwise than according to the law governing it. It is not the fact that civil proceedings may be slack and criminal proceedings must be strict. A dereliction of duty may, of course, be of greater or less moment according to the nature of the proceeding in which it happens. As regards the standard of proof I would repeat what was held in *Weston* v. *Peary Mohan Dass* (2); that there is but one rule of evidence which in India applies to both civil and criminal trials, and that is contained in the definition of "proved" and "disproved" in s. 3 of the Evidence Act. Whether the case is civil or criminal, a fact is only proved or disproved if it comes within the terms of

(1) [1899] A. C. 549, 561. (2) (1912) I. L. R. 40 Calc. 898.

that section. It may be conceded that the case against the persons before us must be proved strictly, which means according to law. That charge is that the two sets of parties before us, namely printer and publisher of the newspaper *Amrita Bazar Patrika*, and the directors and managers of the "Amrita Bazar Patrika, Ld." committed a contempt of Court by publishing and being privy to the publication of the articles of 18th and 22nd May set out in the affidavits of the Registrars.

The first question is whether these articles constitute a contempt of Court, and then, if so, who if any of the parties before us are responsible for it. Learned counsel who appeared for the various parties have offered different arguments as to the construction of the articles. The actual facts which are undisputed are that some cases were instituted against the Calcutta Improvement Trust on the Original Side of this Court before Greaves J., which failed, that learned Judge holding that the Calcutta Improvement Act gave the Trustees power to acquire land by way of recoupment. Another case against the same Trust came up for hearing on appeal from the Mofussil. Previous to the hearing by this latter Bench on the Appellate Side of the Court an application was made by counsel for the Trust to the Chief Justice for the transfer of the case from the last mentioned Bench on the ground that Mookerjee J. was a land-owner and therefore personally interested. That application was refused on the ground that the learned Judge would himself determine whether the circumstances were such that he should hear the case or not. The objection was not repeated before the learned Judge himself and the case was then heard on the Appellate Side of the Court by Mookerjee and Cuming JJ., who held that the Trustees had no such powers. After that there was then

1917

MOTI LAL GHOSE AND OTHERS, *In re.*

WOODROFFE J.

an appeal to the Privy Council by the Trust against the decision of Mookerjee and Cuming, JJ., and an appeal by the parties suing the Trust against the decision of Greaves J. to this Court hearing appeals from the Original Side. The Judges who had been previously taking such appeals were the Chief Justice and myself. On the 18th May 1917 the first of the articles appeared. Its salient points are these:—It alleges the existence of a "mischievous rumour which should be contradicted." The writer does not himself contradict the rumour, but gives it further currency. That rumour was stated to be that an attempt was being made by or on behalf of the Calcutta Improvement Trust "to get up" and "secure" a Bench after its "own heart" to deal with the appeal from the decision of Greaves J., so that that Bench might act "as a counterpoise" to the Bench of Mookerjee and Cuming JJ. Expressing confidence in the Judges the writer says that he does not think that any official of the Trust "can go so far."

The Benches of this Court are appointed by the Chief Justice, it may be in some cases after consultation with the Judges. It is of course plain that a litigant could not "get up" or "secure" a Bench of his own "choice" and after his own heart except with the complicity of the Chief Justice or Judges. Of this the writer of the articles is well aware, for he says that he is "sure the interest of every ratepayer is safe in the hands of the Hon'ble Judges" and he "does not think that any official of the Trust can go so far." As I have said, the Original Side appeals were then being heard by a Bench of two Judges, namely, the Chief Justice and myself. A hearing of Original Side appeals by two Judges is not a convenient one nor in conformity with old practice, but it has been in existence for several years since Sir Lawrence Jenkins' time owing to the great bulk of work and the

shortage of Judges to deal with it. It is not convenient because it is advisable that there should be a third Judge to turn the scale in cases of difference of opinion. As the appeals under consideration involved a question of great public interest and might involve a reference to a Full Bench, the Chief Justice with my concurrence determined to appoint a third Judge to meet the possible case of a difference of opinion and a practically infructuous hearing. A third Judge has been added to the usual Bench of two Judges on previous occasions. The third Judge added was Chitty J.. the next senior Judge to myself, excluding Mookerjee J. who had tried the Improvement Trust Appeal, which raised the same question as that which the Appellate Court hearing the appeal from Greaves J.'s decision had to determine. Before the constitution of the Bench was actually published, the second article of the 22nd May appeared. That article is based on a number of misstatements. It wrongly assumes that there was an Appellate Bench constituted to hear "appeals against the awards of the Improvement Trust." It wrongly states that this supposed Bench was composed of Mookerjee and Cuming JJ. It then wrongly states that this Bench had latterly come to be presided over by the Chief Justice and myself. It then says that the "withdrawal" of Mookerjee J. (which is not true) had given rise to rather "unsavoury impressions in the public mind" since this supposed "withdrawal" and supposed reconstitution of the Bench followed "close upon the heels of his judgment" in the case I have mentioned. The suggestion involved in these alleged impressions is of course that Mookerjee J., who is supposed to have had charge of Improvement Trust cases, was "withdrawn" because he had decided against the Trust. He could not himself "withdraw" of his own motion, nor can any one else, but the Chief

1917

MOTI LAL GHOSE AND OTHERS, *In re.*

WOODROFFE J.

Justice who appoints the Benches But why should he be so "withdrawn"? The first article suggests the reason, namely, that the Improvement Trust was endeavouring to get up and secure a Bench after its own heart as a counterpoise to the decision of Mookerjee and Cuming JJ. Then it says, "Something like consternation prevails on account of the proposed new constitution of the Appellate Bench," that is, by the substitution of the Chief Justice and myself for Mookerjee and Cuming JJ., the "withdrawal" of Mookerjee J., which had given rise to rather "unsavoury impressions," the addition of Chitty J. and the non-selection of any Indian Judge. It suggests that the presence of one or more of these was necessary, because of their knowledge of local conditions. I may here observe that the printer sought to prove good faith by, amongst others, the allegation that it was well-known that the Trust objected to their case being tried by any Indian Judges. The point before the Court in the Trust cases was a pure question of law equally well triable by either an English or Indian Judge, unless we accept Mr. Jackson's strange argument (from which Mr. C. R. Das dissented) that that Judge is best qualified to try such cases who is interested therein by reason of his possession of land in Calcutta. Reading this second article in connection with the first, the inference to be drawn from it, in the absence of any explanation from its writer, is that the alleged machinations of the Trust to secure a Bench according to "somebody's choice" had succeeded and that the Bench which was to hear the appeal from the decision of Greaves J. was packed. Of course, there is no question but that if this was the suggestion there has been a gross contempt of Court. Mr. Norton, who appeared on behalf of the printer and publisher, contended that the two articles should not be

read together. There is no substance in this. But he frankly conceded that if the two articles be read together, then they were capable of the above-mentioned interpretation, though he did not admit that that was meant and suggested that the writer did not understand the meaning of the word "unsavoury". But how can we say that when the writer and editor are not before us?

Mr. Jackson's argument lends support, though perhaps unconsciously, to the construction I give to these articles. For he has endeavoured to reconstruct what he called the atmosphere in which they were written, with a view to show that the writer acted in the public interest and in good faith. But, when a person has written nothing which is *primâ facie* an offence, a plea of good faith is unnecessary. It is only relevant on the assumption that the articles do on their face appear to be contemptuous. It is then said that the writer was only repeating rumours to which he himself did not give credence. One cannot escape either contempt or libel merely by alleging that there was a rumour. This is a common way in which libels are spread. The existence of a rumour, if there was one in fact, is no justification in itself for its repetition. Moreover the writer associates himself with these alleged public suspicions. Thus he says, "Now what neither the public nor ourselves can understand" and so forth. And in further dealing with the matter he refers to a contention which the Chief Justice will not "care to advance."

Then it is said that the writer was merely stating the existence of these "unsavoury impressions in the public mind" in the interest of the Court so that they might be contradicted. It is said that he has more than once expressed his perfect faith and confidence in the Chief Justice and Judges. That is so. It

1917

MOTI LAL GHOSE AND OTHERS, *In re.*

WOODROFFE J.

is an obvious question to ask why, if the writer meant no offence, but was only acting for the Court's good, he was not brought forward. What had he to fear? Will it be suggested that the fear is that nevertheless the Court might deal with him unjustly? If so, this is, as I have said, the strongest argument against the sincerity of his professions of faith and confidence in the Judges. In my opinion, it is not possible to accept an argument that the writer meant no offence and was merely acting in protection of the Court from unsavoury public impressions, when he is not even named, much less brought forward. Moreover, the article itself does not, in the absence of any explanation from him, support this view. It states certain alleged rumours. It misstates the facts which are supposed to be the cause of these rumours. It does not contradict these rumours and say and show that there is nothing in them. It on the contrary gives them circulation. The writer associates himself with those who are said to entertain these alleged unsavoury impressions. He writes in a way open to the inference that the alleged manœuvres of the Trust had succeeded. It may be that these expressions of faith and confidence and so forth were inserted, to use an expressive phrase of counsel, for the "protection" of the writer. It is possible that if the editor or writer had appeared before us, he might have succeeded in showing that, however apparently unfavourable to him the language of these articles is, yet in fact no offence was intended. But he is not produced and we must give them what seems to us their natural meaning. It has been held that even where the writer knew that proceedings were still pending, the fact that he did not desire or intend to prejudice the case is immaterial (except as to the extent of his punishment) if the Court be satisfied that such was the obvious and necessary result of his

words: *Daw* v. *Eley* (1), *In re Martindale* (2), *In re The Marquis of Townshend* (3). In the absence of the editor or writer I can only and do infer the intent from a consideration of the natural meaning of the words used and the impression which I believe they would convey to the ordinary reader of them.

In the present case the articles not only scandalise the Court but are otherwise a contempt. For it is a contempt to prejudice or attempt to prejudice a litigant and to interfere with the course of justice. Here the Trust is a litigant in this Court, and it is suggested that it has been attempting to influence the course of justice by trying to "get up" a Bench of its "choice," of which allegation there is no proof whatever. Next the writer of the article himself seeks to control the formation of the Benches in his own way by putting forward alleged unsavoury impressions in the public mind based on a number of wholly unfounded statements, adding that, as soon as the Chief Justice understood the supposed public feeling in this matter, his Lordship would form a Bench of a nature which the writer approved. In my opinion, the articles do constitute a contempt of Court.

I now pass to the question as to which, if any, of the parties before us are responsible for it. Mr. Norton for the printer and publisher, Tarit Kanti Biswas, has conceded that, if we hold that there is a contempt, then his client is liable; though he pleads for mitigation of punishment—a matter with which I later deal. This liability is obvious because scienter is attributable both to printer and editor. Neither can escape liability by alleging that he did not know that the contemptuous words had been inserted in his newspaper:

(1) (1868) L. R. 7 Eq. 49, 59. (2) [1894] 3 Ch 193, 200.
(3) (1906) 22 T. L. R. 341.

1917

MOTI LAL GHOSE AND OTHERS, *In re.*

WOODROFFE J.

Cheshire v. *Strauss* (1), *The King* v. *Parke* (2), *The King* v. *Davies* (3), *Ex parte Jones* (4). As regards the others, the affidavit of Mr. Hechle, the Registrar, shows that the paper is, according to the imprint, printed and published at the Patrika Press, Nos. 19 and 20, Bagbazar Street, and issued by the Patrika Post Office, Calcutta. This Patrika Press works for the "Amrita Bazar Patrika Co., Ltd.," which was incorporated with the object, amongst others, of carying on the business of newspaper proprietors by printing and publishing newspapers and taking over the rights in the previously existing *Amrita Bazar Patrika* newspaper. The registered office of the Company is, No. 2, Ananda Chatterjee's Lane, Calcutta. A certified copy of the annual summary shows that Moti Lal Ghose, Golap Lal Ghose and Pijush Kanti Ghose are directors and Golap Lal Ghose above mentioned and Mrinal Kanti Ghose are managers. It will be observed that all these persons are named Ghose, and they all give the same address, which happens also to be that of the registered office of the Company.

The total number of shares taken up is 766. Of these only 16 were issued for cash, probably for the expenses of incorporation, and 750 for a consideration other than cash. These shares of Rs. 100 each are held by 15 persons. The Ghose directors and managers hold 369 shares, three other persons of the name of Ghose hold 234 shares. There are four lady proprietors holding 112 shares. Against the name of the first the father's name is given as Moti Lal Ghose. It is not clear from the summary whether the latter stands in the same relation to the other three ladies There is one person of the name of Datta who holds 51 shares. The addresses of all these persons (the

(1) (1896) 12 T. L. R. 291.
(2) [1903] 2 K. B. 432.
(3) [1906] 1 K. B. 32.
(4) (1806) 13 Ves. 237.

ladies and N. G. Datta included) is given as 2, Ananda Chatterjee's Lane, showing that this is a place of residence as well as being the registered office of the company. It is obvious on this evidence that these persons are related, that they live at the same address which is the registered office, and that the company is merely a small family business incorporated.

All the persons cited except Mrinal Ghose are directors. The latter is described as manager (with Golap Lal Ghose) and also as secretary. That Pijush and Mrinal Ghose are director and manager, respectively, is also admitted in their affidavits. As regards Moti Lal Ghose and Golap Lal Ghose who have filed no affidavits a number of technical, and in my opinion trivial, objections has been taken. The first objection taken by Mr. C. R. Das is that there is no proof that they are directors, notwithstanding that their co-directors and secretary have sworn that they are, and they have themselves declined to give any information on any point to the Court. The argument is based on the contention that the certified copy of the summary filed on the 9th May 1917 of share capital and shares, etc., as they stood on the 5th March 1917 purporting to be signed by Golap Lal Ghose as financial manager, was not admissible. Mrinal Ghose's affidavit states that Golap Ghose is a director and financial manager, but Mr. C. R. Das contended that this is not admissible against him nor (it must follow) against Moti Lal Ghose. It is not necessary to go into this last objection, for I think that the summary was a public record of a private document, of which a certified copy is admissible [Evidence Act, sections 74, 75, 65 (*e*)]. It has been argued that "record" in 74 cl. (*2*) refers only to the case where the public office itself makes a copy, that is record of a private document, and keeps it,

1917

MOTI LAL GHOSE AND OTHERS, *In re.*

WOODROFFE J.

If it does, it is certainly a public record, but "record" does not merely mean this. The word "record" also means a collection of documents: section 74 (*2*) refers to private documents made by private persons and kept as a record in public offices to which the public have generally access. If this were not so, how could the public get such documents? The originals being in the custody of a public office the latter would not part with them and not being a public document no certified copy could be given.

The next objection is that if the certified copy is admissible, there is no proof of the signature of Golap Ghose. Assuming that the mere production of a certified copy is not such proof where proof is necessary, it is not necessary here. Such certified copy is proof that some person giving the name of Golap Lal Ghose and describing himself as financial manager of the company signed such document. As that document was accepted by the Registrar of Joint Stock Companies, it is commonsense to assume that he was satisfied that it was a return by the financial manager of the company. The objection, therefore, in substance is that the Golap Lal Ghose who purports to sign this document is not or at any rate has not been shown to be the identical Golap Lal Ghose for whom Mr. C. R. Das has pleaded before us. It is admitted that the objection is technical. That is true, but we must see if alleged technicalities are sound and we must give as much play to commonsense as the law permits. The Rule was served on Moti Lal Ghose and Golap Lal Ghose as directors of the company. These are the persons whom we wished to see, not anybody else. The persons so served came here. If they were not the persons described in the summons they need not have come here. They can only be heard in these proceedings

on the supposition that they are what the Rule states them to be. It is not open to anybody and everybody to come and show cause against this Rule. Mr. C. R. Das's title to be heard at all is dependent on the assumption that he represents the person described in the Rule. The unreal nature of the objection is enhanced by the fact that the secretary of the company has sworn in these proceedings that Golap Ghose and Moti Lal Ghose are directors. If it be, as contended, that we cannot refer to this affidavit when dealing with the case of Golap Ghose and Moti Lal Ghose (a matter I do not decide) this does not make the taking of such an objection any the more sensible. Objections should, even when legal, have same relation to reality.

The third legal objection is that, assuming that the return is proof of the state of affairs on the 5th March 1917 and shows that these two persons were directors on that date, it does not follow that they were directors when the Rule was issued on the 30th May 1917. It is to be observed, first, that, apart from any presumption of continuance, the summary was filed on the 9th May, only three weeks before the issue of the Rule, which was not likely to be done had there been any change between the 5th March and that date. Further, under section 87 of the Indian Companies Act, VII of 1913, changes of directorship are required to be notified by the company, and had there been any change, it would have appeared in the affidavit of Mr. Hechle, the Registrar, as the result of his recent inquiry in the matter. Nor is it likely that the Registrar of Joint Stock Companies would issue to an inquirer a certified copy of a return which had been changed. This objection is as unreal as the rest. I have no doubt whatever that Moti Lal Ghose and Golap Ghose are directors apart from the affidavits

1917

MOTI LAL GHOSE AND OTHERS, *In re.*

WOODROFFE J.

of the secretary of the company, who states that they are in fact such.

According to the Articles of Association produced with the affidavit of Mrinal Ghose, the business of the company is to be managed by the directors, that business being according to the Memorandum of Association the carrying on of the *Amrita Bazar Patrika* newspaper. But here again with further luxury of objection it is protested that we cannot look at the Articles of Association of the company of which these two persons are directors and which have been actually produced by the secretary of the company with his affidavit. It is sufficient to say that the affidavit of the Rule states who are directors, the nature of the company and the facts proved indicate that its business must be carried on by them; and the provisions of this article are the same as and are indeed copied from section 75 of Schedule I, Table A of Act VII of 1913, the provisions of which, unless otherwise arranged, apply to all companies. The table of the earlier Act is on this point substantially the same. It has been therefore proved as against the parties named as directors that they are such.

The question whether persons in the position of directors are responsible must depend on the facts of each case. In *Reg.* v. *Judd and Others* (1), the directors of Judd and Co. used to print and deliver a newspaper to another company who published the same. They did not, it was held, sell or deliver, a fact which would relieve them from even civil liability. In *Ex parte Green* (2), the manager of a limited company which disseminated paragraphs amounting to contempt of Court was held responsible. In that case the manager denied that he had seen the matter before it was published, and that in general it was no part of his

(1) (1888) 37 W. R. (Eng.) 143. (2) (1901) 7 T. L. R. 411.

duty to supervise the reading out of news. The affidavit of the party taking proceedings spoke only to his "information and belief" as to the responsibility of the manager. This was held to be *primâ facie* sufficient, and on the letters and affidavit he was held guilty. In one case it was held that the individual liability had not been directly established and in another that it had been. Doubtless, in the case of an ordinary large newspaper company where the directors meet together once a week to transact business in the board rooms, the ordinary inference might be (in the absence of direct evidence) that they were not conscious of the publication of a particular article, for in the case supposed they would have appointed an editor. The facts in the present case are very different and peculiar. In *Legal Remembrancer* v. *Matilal Ghose* (1), a statement resting on information and belief that Mati Lal Ghose was editor was ruled out as not being legal evidence, and the fact that Mati Lal Ghose did not in that proceeding deny the allegation was held immaterial. No disclosure was made as to whether there was an editor or who he was. Ordinarily of course a newspaper has an editor, but we have no legal evidence of that in this case, and the affidavits filed by one of the directors and the secretary and printer, do not even mention the existence of such a person. The company as I have said appears to be a small family affair composed, in the main, of Ghoses whose address is that of the registered office of the company, which is also given as that of some ladies, one of whom at least is the daughter of Moti Lal Ghose. Three of these Ghoses including Moti Lal Ghose are directors and another Ghose is secretary. The Articles of Association direct, not that the business shall be under their control, but that they

(1) (1913) I. L. R. 41 Calc. 173.

1917

MOTI LAL GHOSE AND OTHERS, *In re.*

WOODROFFE J.

shall manage the business. That business is shown to be the carrying on of the newspaper *Amrita Bazar Patrika*, which is "now being published from No. 2, Ananda Chatterjee's Lane." Some one must see to the literary part of the business. In the absence of evidence as to there being a separate editor, *primâ facie* the directors who are authorised to manage the business are the persons who do so in all its aspects. They must have authorised the circulation of the paper. Had there been reliable evidence that there was an editor who was some person other than the defendants, even though his name was not disclosed, *primâ facie* the responsibility for the articles would have lain with the editor, though of course the directors or other persons would also have been liable who were shown to be privy to the publication. Here there is evidence that the management of this business is entrusted to the directors. That business includes every department of it, financial, literary and so forth, for there is nothing to prevent one or other of the directors being also editor. This is the inference which arises on the facts here proved. If the directors have in fact delegated any of these functions to some other person it is for them to show that fact. I am of opinion, therefore, that the affidavit in support of the motion disclosed a *primâ facie* case against the directors as such calling for an answer from them. As regards the permanent manager and secretary, I deal later. Having regard to the facts proved I need not further consider their case here.

But assuming that the affidavit accompanying the Rule does make a case calling for an answer, the matter does not rest there. Pijush Kanti Ghose has put in an affidavit and has sworn that neither he nor his co-directors exercise any control over the contents of the newspaper and exercise "only such powers as are

mentioned in the Articles." Who does control the paper is not stated. A similar statement is made in the affidavit of Mrinal Kanti Ghose. Next, the affidavit of Pijush Kanti Ghose swears that he was away from Calcutta on the date of the second or chief article. Therefore he is shown not to have been directly privy to it. Similarly, the affidavit of Mrinal Kanti Ghose states that he exercises no control over the contents of the newspaper, that his duties are to keep the minutes, registers and records of the company, to issue notices and to make returns. Further, he swears that he was absent from Calcutta on both the dates when the articles appeared. He has therefore also met the case against him. There remains the cases of Golap Lal Ghose and Moti Lal Ghose, neither of whom have given any answer. The above-mentioned affidavits state that Golap Lal Ghose also has no control over the contents of the paper, and this statement is supported by the fact that the return the latter made to the Registrar of Joint Stock Companies shows that he is financial manager. Ordinarily, therefore, he would attend to this side of the business and probably to this only. There lastly remains amongst the directors the case of Moti Lal Ghose. He also has not filed an affidavit, and we are told less about him than any one else. The affidavits offered to us seem to be of what is called a "tricky" character. The wording is in the present tense. As was pointed out by my brother Fletcher they might not support a prosecution. They do not deal with the condition of things when the articles were published. They do not state precisely what powers the directors do exercise, or whether there is an editor. The statement that the directors have no control over the contents does not show that they were not aware of the articles before

1917

MOTI LAL GHOSE AND OTHERS, *In re.*

WOODROFFE J.

they were published and circulated by their authority. Had there been no affidavits, I would have been disposed to adjudge that Moti Lal Ghose was in contempt; even after the reading of these affidavits, my mind has been in doubt, for the affidavits are deliberately drawn to keep all information from the Court and are as above stated otherwise unsatisfactory. Moti Lal Ghose has filed no affidavit. Though it has been objected by counsel (Mr. C. R. Das) for one of the parties, that we cannot consider as against any particular party the affidavit offered in defence by other parties (a point I need not consider), still I am unwilling as against Moti Lal Ghose to rest the case on any such technicality. I cannot shut my eyes to the fact that there are three sworn statements before us that neither the directors, financial manager, secretary or printer have contol over the contents of the newspaper. As I have said, I have my doubts as to the sufficiency of this statement. Moti Lal Ghose (whose case I regard with strong suspicion) is however entitled to the benefit of them. As some one must have such control we must now assume after the reading of these affidavits that there is an unnamed editor who is not before the Court. I conclude then that the affidavits offered in reply to the Court's Rule are such that it should be discharged against the parties to these proceedings other than the printer and publisher Tarit Kanti Biswas. We might, without all this complex argument, have come to the same conclusion within half an hour if all the parties had sworn that they were not responsible and disclosed the name of the editor who, subject to any explanation he might make, was liable. As already stated, it is conceded by his counsel, Mr. Norton, that the printer is liable provided that the articles constitute a contempt. He has, however, argued that the case is not of so serious

a character as to call for the exercise of this jurisdiction, and if it is, he lastly pleads that the position of his client should excite our pity and that we should discharge him without penalty.

In my opinion, the case does call for the exercise of this jurisdiction by reason of the articles scandalising the Court, having a tendency to prejudice the parties and to interfere with the administration of justice. As regards the action to be taken and penalty to be awarded each case must depend on its own facts.

As regards the second point, I cannot yield to the suggestion that merely because a man is a printer and publisher he should escape scotfree. Did we hold this it would be open, as in this case, for the parties to exculpate themselves by affidavit and to suppress all information as to who was in fact responsible. The printer might also be put up to refuse such information and be told, "It is all right, say you are only the printer and ask for pity, and then we shall all be excused." Our jurisdiction would thus become largely illusory. I do not say that there may not be cases where the Court will deal leniently with the printer, but this is not one. In the first place, he states in his affidavit that it was known to him that the matter dealt with by these articles was the subject of concern to the public "who were watching with deep interest" the action of the Chief Justice in constituting the Court to hear the appeal from the decision of Greaves J. He then says that the articles were published to give expression to public feeling in Calcutta and that the "articles were published by myself in good faith and in the public interest." The statement is on its face in conflict with paragraph 3 of his affidavit, where he says that he did not read the articles before publication, nor did he consider at any time prior to their publication their meaning or purport. If this be true,

1917

MOTI LAL GHOSE AND OTHERS, *In re.*

WOODROFFE J.

how could they have been published by him in good faith and in the public interest? According to his own statement, he was aware that the subject was creating public interest, and he is prepared to swear that the articles were published to give expression to public feeling. If there were, in fact, such an interest, there was the greater necessity for caution on his part in seeing what he published with reference to it. His statement that in fact he did not see the articles before publication is weakened by the attempted justification that they were published "by myself in good faith and in the public interest," though it is of course possible that this inconsistency was due to bad drafting. As however the affidavits are in general astutely drawn we cannot well assume this. He denies that the articles are a contempt and seeks to justify himself. In this he fails. Next, he says that he has no control over the contents of the newspaper and that they were handed to him for publication in the usual course of his business. He carefully refrains from saying who gave him the articles, whether it was the editor who did so, or who he was. His counsel justifies this refusal on the ground of loyalty to his employers. If he esteems that loyalty above his public duty to inform the Court who committed this alleged offence, he cannot complain that we do not show him indulgence. He joins the others in refusing information, and, if apart from such refusal he is liable, he must take the consequences. The Courts in England have held [as for example in *The American Exchange in Europe Case*(1)] that this refusal by the printer to give up the name of the editor is a matter which will weigh with it in determining whether a penalty shall be awarded against the printer or not. Mr. Norton has complained (I thought with that moderation which

(1) (1889) 58 L. J. Ch. 706, 707.

rarely goes with real zeal) that his client should be left to suffer because his employers have not produced their editor. In the *Englishman* Contempt Case [*In the matter of Banks and Fenwick* (1)] Captain Fenwick, the editor of that paper, came forward to bear the brunt of what was in reality done by him or his order, on which the Rule was withdrawn against the printer. Sir Barnes Peacock observed that in doing that Captain Fenwick had only done "that which every honourable gentleman who fills an editor's chair would do, in not allowing a publisher of a paper to take the consequence of articles written and published by his orders by not coming forward to avow the authorship". This was also done by Babu Surendra Nath Banerjee in the well-known "*Bengalee*" Contempt Case (2), where Garth C. J. said that Babu Surendra Nath Banerjee had properly done his best to protect his printer. There is no disposition, however, upon the part of any one in this case to adopt this proper and honourable course. But the printer himself does not deny that he is ignorant who the editor is and he himself through his counsel declines to give his name. There are some cases in which one might sympathise with the printer, but here he has not only declined to give up the editor's name, but has otherwise associated himself with the other parties in the case and has sought to justify both himself and them in what I hold to be a contempt, and he must therefore take the consequences such as they are. In, however, adjudging the penalty I have not wholly left out of count the fact that he is the printer, for, had the editor been found guilty of contempt he would in my opinion have been subject to much heavier punishment.

The defence to these proceedings except as to the

(1) (1869) 26 C. L. J. 401, 405. (2) (1883) I. L. R. 10 Calc. 109; L. R. 10 I. A. 171.

1917

MOTI LAL GHOSE AND OTHERS, *In re.*

WOODROFFE J.

construction of the articles—a legitimate argument—was ill-advised and a waste of time. If the directors, managers and secretary were not personally responsible for the contempt, they had only to frankly state the facts on affidavit and disclose who was so liable. The printer similarly, who in law is liable, might have stated the persons from whom he got the articles he printed and thus have personally freed himself from all further action against him. We should then on the supposed facts have only had to deal with the person primarily liable, namely, the editor. He could then, if he had wished, have personally put forward the plea here advanced that the articles have been misunderstood and that on the contrary he was moved by a desire to act in the interests of the Court and to protect it from "mischievous" and "unsavoury" rumours. If this were the fact he would have nothing to fear from Judges who according to the argument before us had the complete confidence of the writer of these articles. Even if these articles were ill-expressed and capable of a bad interpretation their effect might have been negatived by the public avowal of their author that for him they had no such meaning. These proceedings might have thus been disposed of within an hour or less with the result that either all parties might have been freed of penalty or if penalty were awarded it would have fallen on the party primarily liable, namely, the editor. On the contrary, all the parties before us have adopted a hostile attitude to the Court, have refused all information, concealed the name of the editor and put forward every technical objection to defeat an enquiry which has thus been prolonged over three days with unnecessary delay and expense to the public and the parties concerned. For this the parties, by the course they have adopted, are

responsible. This course further has strengthened the inference which is to be drawn from the natural language of the articles in the absence of explanation from the writer. It is not in such absence to be supposed that the intentions of the writer and editor of these articles were as innocent as the argument before us suggests and that the name of one who was, it is said, only seeking to protect this Court from unsavoury rumours and to give it what he thought good advice should be kept concealed. It is absurd also to suppose that the party responsible would himself, if innocent, carefully avoid the presence of the Court which it is said he honoured and was seeking (however ill-considered his language might be) to counsel and to protect.

I, therefore, concur in the order which the Chief Justice has made.

MOOKERJEE J. On the 18th May, 1917, the following paragraph appeared in the editorial columns of the *Amrita Bazar Patrika*:

"There is a mischievous rumour afloat which should be contradicted. It is stated that a vigorous attempt is being made to get up a Bench to consider the appeal on the judgment of Mr. Justice Greaves in connection with the acquisition of surplus land by the Calcutta Improvement Trust according to somebody's choice. We do not believe that it is possible for any one, far less the Chairman of the Trust, to secure a Bench after his own heart as a counterpoise to the Mookerjee and Cuming Bench. We are sure the interest of every rate-payer is safe in the hands of the Hon'ble Judges, and we do not think that any official of the Trust can go so far."

Four days later, on the 22nd May, the following paragraph appeared in the editorial columns of the same paper:

"Something like consternation prevails on account of the proposed new constitution of the Appellate Bench of the Calcutta High Court, before which appeals against the awards of the Improvement Trust are to be heard. It is known to the reader how this Bench was originally composed of Sir Asutosh Mookerjee and the Hon'ble Mr. Justice Cuming, and how

1917

MOTI LAL GHOSE AND OTHERS, *In re.*

MOOKERJEE J.

latterly it has come to be presided over by the Hon'ble the Chief Justice and Mr. Justice Woodroffe. Rumour has it that, for purposes of hearing Improvement Trust Appeals, the Bench is going to be strengthened by the appointment of Mr. Justice Chitty. Now, what neither the public nor ourselves can understand is this special arrangement for such a Special Bench. If it is contended that two Hon'ble Judges of the highest Court in the land are not competent to decide in appeal cases in which the Improvement Trust is concerned,—a contention, however, which we do not believe the Chief Justice will care to advance,—why should there be a Special Bench of three and not a Full Bench of five, on which at least two Indian Judges could find seats? As a matter of fact, as land-owners in Calcutta are mostly Indians, and as Indian Judges are likely to know more of conditions, practices, etc., prevailing here, it is but meet that the Appellate Bench in the present circumstances should be so composed as to associate Indian Judges with their European colleagues. The withdrawal of Sir Asutosh has given rise to rather unsavoury impressions in the public mind, since this proposed arrangement is to follow close upon the heels of his judgment in the case of *Chandra Kanta Ghosh* v. *The Improvement Trust* (1). Be that as it may, we have perfect faith in the present Chief Justice and believe that as soon as Sir Lancelot Sanderson understands the public feeling in the matter, his Lordship will either form a Full Bench or at least associate an experienced Indian Judge with himself for the hearing of Improvement Trust Appeals."

On the 30th May, 1917, the Chief Justice, after previous consultation with the other members of the Court, directed the issue of a Rule on Tarit Kanti Biswas (the printer and publisher of the *Amrita Bazar Patrika*), Moti Lal Ghose, Golap Lal Ghose and Pijush Kanti Ghose, directors, and Gopal Lal Ghosh and Mrinal Kanti Ghose, managers of the company called the "Amrita Bazar Patrika, Limited," to show cause why they should not be committed or otherwise dealt with according to law for contempt of Court committed by the publication of the two articles mentioned concerning the High Court and the Chief Justice in his administration thereof. The materials whereon the Rule was issued were contained in two affidavits sworn by the Registrar on the

(1) (1916) I. L. R. 44 Calc 219.

Original Side and the Registrar on the Appellate Side as to the actual publication of the articles in the paper and the position the opposite parties occupied in relation to the paper and the company which were its proprietors. The opposite parties have appeared in Court in person and have been represented by counsel; three of them, Tarit Kanti Biswas, Pijush Kanti Ghose and Mrinal Kanti Ghose have filed affidavits which will require examination hereafter. On the elaborate arguments addressed to the Court, the following points emerge for consideration, namely, *first*, what is the true meaning of the two articles mentioned; do they constitute contempt of Court? *secondly*, if the articles constitute contempt of Court, has this Court jurisdiction to punish the offenders summarily, and should such authority, if any, be exercised in the present instance? *thirdly*, what is the true nature of the present proceeding; is it civil or criminal in character? and, *fourthly*, have the opposite parties or any of them been proved to be so connected with the publication of the articles as to render them liable to punishment for contempt of Court?

As regards the first question, namely, the true meaning of the two articles set out above, there can, in my opinion, be little room for doubt, notwithstanding the able and ingenious arguments which have been addressed to us. The obvious course to pursue in a case of this description is to read the offending articles as they stand and to attach to the words used their natural meaning without the assistance of a laborious commentary. The general rule of interpretation cannot be formulated in more precise terms, because objectionable language may take an infinite variety of form; this much is clear that it is incumbent on the Court, in all cases, to consider the general tone of the writing. The meaning and

1917

MOTI LAL GHOSE AND OTHERS, *In re.*

MOOKERJEE J.

intent are to be determined by a fair interpretation of the language used and are matters of law for the Court as to whether or not they constitute contempt. Disclaimer on the part of the publisher as to any intentional disrespect to the Court is consequently not a sufficient defence, when the purpose and meaning of the writing is obviously of a contrary import. No doubt, if the language is fairly capable of an innocent interpretation, the Court will not be astute to read into it a sinister import: *Legal Remembrancer* v. *Matilal Ghose* (1), *In re Marquis of Townshend* (2), *In re Martindale* (3), *Daw* v. *Eley* (4). But, if the intent is fairly clear, liability to punishment for contempt of Court cannot be successfully evaded by the use of a transparent artifice. Tested from this point of view, how do these articles stand? The first article makes reference to an alleged rumour which the writer describes as mischievous and worthy of contradiction. The rumour is stated to have been to the effect that a vigorous attempt was being made to get a Bench constituted according to the choice of somebody to hear the appeal from the judgment of Mr. Justice Greaves in a suit in connection with the acquisition of surplus land by the Calcutta Improvement Trust. The writer expresses his belief that no official of the Trust, far less the Chairman, could go so far as to make an attempt of this character, and that it was not possible for any body to secure a Bench after his own heart as a counterpoise to what is called the Mookerjee and Cuming Bench. The writer concludes with an assurance that the interest of every citizen is safe in the hands of the Judges. If this article had stood by itself, it might perhaps have been argued with seeming plausibility that, however much open to reproach on the ground of

(1) (1913) I. L. R. 41 Calc. 173.
(2) (1906) 22 T. L. R. 341.
(3) [1894] 3 Ch. 193, 200.
(4) (1868) 7 Eq. 49, 59.

indiscretion and impropriety, the writer had no intention to commit a contempt of Court. But the second article, which is written in a very different tone, shows convincingly the true intent and purpose of the first article. The question, however, was raised before us, whether the two articles should be read together. It was contended that they should not be so read, as there was nothing to indicate that they had emanated from the same individual. In my opinion, the two articles may legitimately be read together to determine their scope and purpose, even though they were proved not to have been written by the same person. They obviously relate to the same topic and were published in the editorial columns of the same newspaper; there was a very brief interval of time between them, and the first obviously led up to the second, though not expressly mentioned therein. The first article has, I think, a sinister import, and conveys the insinuation that one of the litigant parties in the appeals about to be heard was endeavouring to have a Bench constituted according to his choice. There is no room for controversy that imputation of this character constitutes a contempt of Court. Contempt by speech or writing may be by scandalising the Court itself or by abusing parties to actions or by prejudicing mankind in favour of or against a party before the cause is heard; as has been said, there is nothing of more pernicious consequence than to prejudice the minds of the public against persons concerned as parties in causes before they are finally heard and thus to attempt to obstruct or interfere with the due course of justice: *In re St. James Evening Post* (1), *Cann* v. *Cann* (2), *In re The American Exchange* (3), *The Queen* v. *Gray* (4), *The*

(1) (1742) 2 Atk. 469, 471.
(2) (1754) 1 P. Williams (Ch). 567.
(3) (1889) 58 L. J. Ch. 706.
(4) [1900] 2 Q. B 36.

1917

MOTI LAL GHOSE AND OTHERS, *In re.*

MOOKERJEE J.

King v. *Davies* (1), *McLeod* v. *St. Aubyn* (2). But, from my point of view, it is really immaterial whether the two articles are considered separately or are regarded as component parts of one aggregate, for, even if there were any real doubt as to the purpose of the first, there can be no serious dispute as to the meaning of the second.

The second article when carefully analysed may be resolved into the following propositions:

(i) That the Appellate Bench of the Calcutta High Court before which appeals against the awards of the Improvement Trust are to be heard was originally composed of myself and Mr. Justice Cuming.

(ii) That I had been withdrawn from this Bench and that this withdrawal had given rise to rather unsavoury impressions in the public mind, as it followed close upon the heels of the judgment in the case of *Trustees for the Improvement of Calcutta* v. *Chandra Kanta Ghosh* (3), to which I was a party.

(iii) That this Appellate Bench had latterly come to be presided over by the Chief Justice and Mr. Justice Woodroffe.

(iv) That there was a rumour that the Appellate Bench so constituted was about to be strengthened by the appointment of Mr. Justice Chitty, and this proposed new constitution of the Appellate Bench had created something like consternation.

(v) That if the Bench was to be composed of more than two Judges, it should consist of not three but five Judges, of whom two at least should be Indian Judges because land-owners in Calcutta (who were principally affected by the operations of the Calcutta Improvement Trust) were Indians, and Indian Judges were likely to know more of conditions and practices prevailing here than European Judges.

(1) [1906] 1 K. B. 32. (2) [1899] A. C. 549.
(3) (1916) I. L. R. 44 Calc. 219.

These statements constitute a tissue of falsehoods, and, to my mind, one of the most conspicuous features of this trial is that not only has not even the semblance of an attempt been made to establish the truth of these allegations, it has actually been conceded that they are vitiated by a fundamental error. No Bench composed of myself and Mr. Justice Cuming had, at any time, been constituted to hear appeals against what are inaccurately termed the awards of the Improvement Trust. The plain truth is that last year, when Mr. Justice Cuming and myself were in charge of the Bench which had to take cases of what is called the First Group of Districts, the appeal of the Calcutta Improvement Trust against Chandra Kanta Ghosh came up before us, inasmuch as the appeal had been preferred from the decision of a Subordinate Judge of the 24-Parganas. The appeal belonged to our group, was heard by us in due course, and was dismissed. We had at no time been constituted a Special Bench to hear appeals in all cases in which the Improvement Trust was concerned, and there is no foundation whatever for the first proposition that the Appellate Bench, before which appeals against the awards of the Improvement Trust were to be heard, was originally composed of myself and Mr. Justice Cuming. Consequently, the suggestion contained in the second proposition, that I had been withdrawn from the Appellate Bench which, in fact, had never been constituted, is equally groundless. Here I may observe that as under section 108, sub-section 2, of the Government of India Act, 1915, the duty devolves upon the Chief Justice to determine, from time to time, what Judges of the Court are to constitute the several Division Courts, the second proposition necessarily involves an imputation against the Chief Justice that he had withdrawn me from the Appellate Bench he had

1917

MOTI LAL GHOSE AND OTHERS, *In re.*

MOOKERJEE J.

previously constituted, composed of myself and Mr. Justice Cuming, to hear appeals in cases in which the Calcutta Improvement Trust was concerned. There is clearly the further imputation that the Chief Justice had taken this action by reason of my judgment in the appeal preferred by the Improvement Trust against Chandra Kanta Ghosh (1). As the Appellate Bench had never in fact been constituted in the manner stated by the writer, the charge that I had been withdrawn therefrom for the reason assigned was evidently baseless. The third proposition, namely, that the Appellate Bench had been constituted of the Chief Justice himself and Mr. Justice Woodroffe in supersession of the previously constituted Bench composed of myself and Mr. Justice Cuming was consequently equally unfounded; as a matter of fact, long before the constitution of the Bench to hear the appeals from the Original Side, Mr. Justice Cuming had ceased to be a member of this Court. The fourth proposition refers to the rumour that the Appellate Bench presided over by the Chief Justice and Mr. Justice Woodroffe was about to be strengthened by the appointment of Mr. Justice Chitty, and that something like consternation prevailed on account of the proposed new constitution of the Bench. As I read the article, the consternation was due, not so much to the fact that the Chief Justice and Mr. Justice Woodroffe composed the Bench, as to the fact that the Bench was about to be strengthened by the appointment of Mr. Justice Chitty. This implies most unmistakeably that a just decision, that is, a decision just in the estimate of this impartial writer, could not be expected from a Bench so constituted. If language has any meaning, this was clearly a libel on Mr. Justice

(1) (1916) I. L. R. 44 Calc. 219.

Chitty, if not also upon the other two members of the Bench. The fifth proposition involves a libel upon Indian Judges, but in the opposite direction. No doubt, it is very artfully suggested that Indian Judges should be on the Bench to hear this class of cases, because they are likely to know more of conditions and practices prevailing here than European Judges. But, as was well-known, the matter in controversy in the appeals had not the remotest connection with a knowledge of local conditions and practices. The point in issue was a dry question of law as to the true interpretation of a legislative enactment. The writer, however, unmistakeably insinuates that land-owners in Calcutta (who are principally affected by the operations of the Trust) are mostly Indians, and Indian Judges on the Bench might be expected to give a decision in their favour. I do not appreciate the distinction between an insinuation that a European Judge is likely to decide in favour of the Executive, because he is a European, and an insinuation that an Indian Judge is likely to decide in favour of Indian land-owners, because he is an Indian. To my mind, the two statements are equally reprehensible as libels on the Judges of this Court. I cannot, in this connection, pass by in silence the observations of Mr. Jackson as to the constitution of the Bench which actually heard the appeals from the judgment of Mr. Justice Greaves. The Court is called upon, in the present Rule, to consider the true character of the allegations contained in the two articles published in the *Amrita Bazar Patrika*, and to determine whether they do or do not constitute a contempt of Court. We have no concern whatever with the question, whether the Chief Justice who alone is charged with the duty to constitute Division Courts, has in this particular instance exercised wisely or otherwise the discretion

1917

MOTI LAL GHOSE AND OTHERS, *In re.*

MOOKERJEE J.

vested in him by law. The remarks of Mr. Jackson on this subject were absolutely irrelevant for the determination of the question before the Court, and exhibited, I feel constrained with regret to hold, an unusual and unwarranted lapse from that decorum which we are accustomed to associate with the transaction of public business in a Court of Justice. I cannot but deem it significant that the other counsel engaged in this case expressly dissociated themselves with special care from the comments made by Mr. Jackson in this behalf. Here I may observe that in the judgment just delivered by the Chief Justice, he has taken pains to explain the reasons which moved him to constitute the Bench as he did; Mr. Justice Woodroffe also has touched on the subject and expressed his opinion thereon. But, for obvious reasons, which need not be dilated upon, I must respectfully decline to examine the question. Besides, the exercise of discretion by the Chief Justice in the matter of constitution of a Division Court to hear the appeals against the judgment of Mr. Justice Greaves, is, under the law, not liable to be reviewed by this Bench and is not subject to our approbation or disapprobation. I desire, consequently, to guard myself most carefully from the discussion of a question, which, notwithstanding what fell from Mr. Jackson, does not, in my judgment, properly arise even as a side-issue in these proceedings; such a discussion is not likely to advance any useful purpose, because it cannot be of real assistance in the solution of the very narrow issue comprised in the scope of our enquiry, namely, the real import of the two articles published in the *Amrita Bazar Patrika* and whether on a fair interpretation, they did or did not constitute a contempt of this Court; upon that matter, which alone it is our function to decide, I feel no reasonable

doubt. I desire, however, to repudiate most emphatically the astonishing assertion made by Mr. Jackson that landless Judges, as he called them, were, merely because they were landless, less competent and less trustworthy as interpreters of a statutory enactment than Judges of any other class and that Indian Judges, because they might possibly be proprietors of land, were for this purpose more capable and reliable as expounders of the law than their European colleagues. But to return to the two articles: it seems to me indisputably plain that the implication of the second article, whether taken along with or independently of the first, is that, at the instance of persons interested in the Calcutta Improvement Trust, the Chief Justice has constituted a Special Bench to ensure a decision favourable to the Trust in the appeals against the judgment of Mr. Justice Greaves. This brings me to the question which is the crux of the whole matter, namely, whether an imputation of this character constitutes a contempt of Court.

It is not necessary for our present purpose to give an exhaustive enumeration of acts which amount to contempts of Court. It is sufficient to state that scandalous attacks upon Judges, calculated to cause an obstruction to public justice, do constitute such contempts. Blackstone in a celebrated passage of his Commentaries (Vol. IV, page 285), which will be found quoted in *Legal Remembrancer* v. *Matilal Ghose* (1), specifies, in his description of contempts of Court, contempts which arise "by speaking or writing contemptuously of the Court or Judges, acting in their judicial capacity, and which demonstrate a gross want of that regard and respect, which when once Courts of Justice are deprived of, their authority, so necessary

(1) (1913) I. L. R. 41 Calc. 173, 255.

1917

MOTI LAL GHOSE AND OTHERS, *In re.*

MOOKERJEE J.

for the good order of the Kingdom, is entirely lost amongst the people." Sir John Wilmot C.J. in *The King* v. *Almon* (1) justifies a similar view in a passage which may be usefully recalled here: "By our constitution, the King is the fountain of every species of justice, which is administered in this Kingdom. The King is *de jure* to distribute justice to all his subjects; and, because he cannot do it himself to all persons, he delegates his power to his Judges, who have the custody and guard of the King's oath, and sit in the seat of the King 'concerning his justice.' The arraignment of the justice of the Judges, is arraigning the King's justice; it is an impeachment of his wisdom and goodness in the choice of his Judges, and excites in the minds of the people a general dissatisfaction with all judicial determinations, and indisposes their minds to obey them; and whenever men's allegiance to the laws is so fundamentally shaken, it is the most vital and most dangerous obstruction of justice, and, in my opinion, calls out for a more rapid and immediate redress than any other obstruction whatsoever; not for the sake of the Judges, as private individuals, but because they are the channels by which the King's justice is conveyed to the people. To be impartial, and to be universally thought so, are both absolutely necessary for the giving justice that free, open and uninterrupted current, which it has, for many ages, found all over this Kingdom, and which so eminently distinguishes and exalts it above all nations upon the earth." It is needless to multiply early instances of the application of this doctrine, which will be found collected in 3 Howell State Trials, 1074—1080, and 8 Howell State Trials, 50. Amongst modern instances, reference may be made to the observations in *The matter of a special reference from the Bahama*

(1) (1765) Wilmot 243, 255.

Islands(1), *The Queen* v. *The County Court Judge of the County of Staffordshire* (2), *The Queen* v. *Gray* (3), *The King* v. *Davies* (4), *Surendra Nath Banerjee* v. *Chief Justice of Bengal* (5), *In re S. B. Sarbadhicary* (6), *In re William Tayler* (7), and *In re Banks and Fenwick* (8). The principle deducible from these cases is that punishment is inflicted for attacks of this character upon Judges, not with a view to protect either the Court as a whole or the individual Judges of the Court from a repetition of the attack, but with a view to protect the public, and specially those who, either voluntarily or by compulsion, are subject to the jurisdiction of the Court, from the mischief they will incur, if the authority of the tribunal be undermined or impaired. The contention has been advanced, however, that if this be the true reason for the rule, it is necessary to establish, as a matter of fact, that the actual effect of the publication has been an obstruction to public justice, and that, in the absence of such proof, it cannot be held that there has been a contempt of Court. In support of this position, reliance has been placed upon the decisions in *R.* v. *Freeman's Journal* (9), and *R.* v. *Dolan*(10). The cases mentioned do not support this proposition, which is, on the other hand, negatived by the decisions in *R.* v. *Gray* (11), *Hunt* v. *Clarke*(12), *In re Pall Mall Gazette* (13), *Grimwade* v. *The Cheque Bank, Ld.* (14); these show that a contempt of Court is committed by

(1) [1893] A. C. 138, 148.
(2) (1888) 57 L. J. Q. B 483.
(3) [1900] 2 Q. B. 36, 40.
(4) [1906] 1 K. B. 32, 40.
(5) (1883) I. L. R. 10 Calc. 109; L. R. 10 I. A. 171.
(6) (1906) L. R. 34 I. A. 41; I. L. R. 29 All. 95.
(7) (1869) 26 C. L. J. 345, 390.
(8) (1869) 26 C. L. J. 491, 457.
(9) (1902) 2 I. R. 82.
(10) (1907) 2 I. R. 260.
(11) [1900] 2 Q. B. 36, 40.
(12) (1889) 58 L. J. Q. B., 490, 492; 37 W. R. 724.
(13) (1894) 11 T. L. R. 122.
(14) (1897) 13 T. L. R. 305.

1917

MOTI LAL GHOSE AND OTHERS, *In re.*

MOOKERJEE J.

libellous attacks on a Judge for what he did judicially, if such attacks are likely, or tend in any way, to interfere with the due administration of justice. As Elliot J. well puts it in *People* v. *Stapleton* (1), it would be as reasonable to require proof of actual hindrance in the administration of justice by reason of a libellous attack on a Judge in his judicial capacity, as for a person who has made a violent assault on another to plead that he has committed no offence because he has not succeeded to overcome his victim. It is not only important that the trial of causes shall be impartial and that the decisions of the Courts shall be just, it is equally important that causes shall be tried and judgment rendered without bias, prejudice or improper influence of any kind. He who scandalises the Court or a Judge in relation to a particular litigation, commits an offence, not merely against the rights of those litigants, but also against public justice: *In re Bahama Islands*(2). It is a public wrong, a crime against the State, to undertake, by libel or slander on the Judges, to impair confidence in the administration of justice. That a party indulges in calumny of the gravest character, and, consequently, does not succeed in his endeavour to shake the confidence of the public in the Court, surely does not alter the quality of his act or make it any the less reprehensible. From this standpoint, it is immaterial whether the attack on the Judge is with reference to a case about to be tried, or actually under trial, or recently adjudged; in each instance, the tendency is to poison the fountain of justice, to create distrust, and to destroy the confidence of the people in the Courts, which are of prime importance

(1) (1893) 18 Colorado 568; 23 L. R. A. 787; 33 Pacific 167.

(2) [1893] A. C. 138, 148.

to them in the protection of their rights and liberties; *R.* v. *Gray* (1). Upon my construction of the second article, read with or without reference to the first, I hold that it undoubtedly constitutes a contempt of Court.

As regards the second question, there is no room for controversy that this Court has power to punish summarily a contempt of Court committed by the publication of a libel on the Court or on the Judges, when the Court is not sitting. By clause (1) of the Letters Patent of 1862 and clause (2) of the Letters Patent of 1865, the Court was constituted as a Court of Record; and, as a Superior Court of Record, it has summary jurisdiction to punish for contempt of Court. This was affirmed in respect of the Superior Courts at Westminister by Wilmot C. J. in *R.* v. *Almon* (2), and his opinion has been quoted with approval in a long line of decisions, the most notable whereof is, perhaps, the judgment of Cockburn C. J. in *The Queen* v. *Lefroy* (3). Mr. Jackson contended that this view will not stand scrutiny, and may properly be described as "law taken for granted." In this connection, he invited our attention to a celebrated passage from the judgment of Lord Denman L. C. J. in *R.* v. *O'Connell* (4). "A large portion of that legal opinion, which has passed current for law, falls within the description of 'law taken for granted'; if a statistical table of legal propositions were drawn out, and the first column were headed 'law by statute' and the second 'law by the decisions,' a third column under the heading of 'law taken for granted' would comprise as much matter as both the others

(1) [1900] 2 Q. B. 36, 40.
(2) (1765) Wilmot 243, 254.
(3) (1873) L. R. 8 Q. B. 134, 137.
(4) (1844) 5 St. Tr. N. S. 1, 877; 11 Cl. & F. 155, 373; 65 R. R 59; 1 Cox C. C. 413.

1917.

MOTI LAL GHOSE AND OTHERS, *In re.*

MOOKERJEE J.

combined. But when in pursuit of truth we are obliged to investigate the grounds of the law, it is plain, and has often been proved by recent experience, that the mere statement and restatement of a doctrine, the mere repetition of the cantilena of lawyers, cannot make it law, unless it can be traced to some competent authority, and if it be not irreconcilable to some clear legal principle." But the question remains, whether the proposition, that a Superior Court of Record has power to punish summarily for contempt of Court, can appropriately be treated as "law taken for granted." I am not unmindful that a learned writer (Mr. John Charles Fox in the Law Quarterly Review, Vol. XXIV, 184, 266) has maintained the view that the opinion expressed by Wilmot C. J. in *R.* v. *Almon* (1) is not historically accurate. Let us assume that this criticism is well-established on the ancient authorities, and that while originally the Superior Courts of Common Law had jurisdiction to punish only disobedience to the King's writ summarily by fine and imprisonment upon attachment, they had jurisdiction only on indictment or bill to punish contempts *in facie* and other obstructions to the Administration of Justice, such as libelling the Court or the Judge. Let us assume also that the development of the summary jurisdiction to punish contempts has been of slow growth and that the earliest recorded case of libel or slander on the Court or a Judge by a stranger unconnected with the service of process, which was punished summarily by attachment, cannot be traced to a period anterior to 1720. Surely, this cannot but be regarded now as a matter of other than antiquarian interest. We have abundant "competent authority" "not irreconcilable to clear legal principle," in support of the view that a Superior Court of Record does

(1) (1765) Wilmot 243.

possess the power to punish summarily contempts of Court of the description now before us. Sir Barnes Peacock, C. J., maintained and applied this principle in *In re Abdool and Mahtab Chaprasses* (1), and in *In re William Tayler*(2), which, upon a full review of the authorities, was reaffirmed in *Legal Remembrancer* v. *Matilal Ghose* (3). We have also the pronouncement of the Judicial Committee to the same effect in *McDermott* v. *Judges of British Guiana* (4), where they confirmed the view indicated in the earlier cases of *Smith* v. *The Justices of Sierra Leone* (5) and *Rainy* v. *The Justices of Sierra Leone* (6). As regards the power of Indian High Courts in a case of this character, we have two decisions by the Judicial Committee, namely, *Surendra Nath Banerjee* v. *Chief Justice of Bengal* (7), and *In re Sarbadhicary* (8). In the former case it was ruled that the High Court had power to punish in a summary manner, by fine or imprisonment or both, a contempt of Court, which in that case, as in the present, consisted in the publication out of Court of a libel on one or more of the Judges. In the latter case, the Judicial Committee held that there was no doubt that the publication of the libel in question constituted a contempt of Court, which might have been dealt with by the High Court in a summary manner, by fine or imprisonment or both. In my opinion, these repeated pronouncements by the Judicial Committee conclude the matter, so far as "competent authority" is concerned, and no useful purpose can be served by an examination of the historical basis of the opinion expressed by Wilmot C. J.

(1) (1867) 8 W. R. Cr. 32.
(2) (1869) 26 C. L. J. 345, 390.
(3) (1913) I. L. R. 41 Calc. 173, 243.
(4) (1868) L. R. 2 P. C 341.
(5) (1841) 3 Moo. P. C. 361.
(6) (1852) 8 Moo. P. C. 47.
(7) (1883) I. L. R. 10 Calc. 109 ; L. R 10 I. A. 171 ; 2 Cel. Tr. 19.
(8) (1906) I. L. R. 29 All. 95 ; L. R. 34 I. A. 41.

1917

MOTI LAL GHOSE AND OTHERS, *In re.*

MOOKERJEE J.

That the possession of this power by a Judicial tribunal (however cautiously and sparingly it may have to be exercised) is not also "irreconcilable to clear legal principle" is beyond serious controversy; indeed, the summary power to commit and punish for contempts tending to obstruct or degrade the administration of justice, is essential to the preservation of order in judicial proceedings, to the maintenance of the authority of a Court and to the enforcement of its judgments; it is a necessary incident and attribute of a Superior Court, without which it could no more exist than without a Judge. [See the cases reviewed in *Legal Remembrancer* v. *Matilal Ghose* (1)]. It was argued, however, on the authority of the decision of the Judicial Committee in *McLeod* v. *St. Aubyn* (2) that committals for contempt of Court by scandalising the Court itself had become obsolete in England. It may be observed here parenthetically that this very decision of the Judicial Committee is an authority for the proposition that, as laid down by Lord Hardwicke in the *St. James Evening Post case*, *Roach* v. *Garvan* (3), the publication of scandalous matter in respect of the Court itself is a contempt, and that power summarily to commit for contempt of Court is necessary for the proper administration of justice. I do not read the statement, that committals for contempt of Court by scandalising the Court itself had become obsolete in England, as destructive of the authority of the earlier decisions on the subject. Indeed, the proposition taken literally seems to go too far, and it is significant that in the very next year proceedings were taken in England for contempt of Court in the case of *R.* v. *Gray* (4). There can, I think, be no doubt that where the circumstances

(1) (1913) I. L. R. 41 Calc 173, 245.
(2) [1899] A.C. 549.
(3) (1742) 2 Atk. 469, 471.
(4) [1900] 2 Q. B. 36.

clearly demand action of this description, the Court will not hesitate to exercise its undoubted power to punish on summary process the contempt of scandalising it and thereby attempting to interfere with the due course of justice. No doubt, as Lord Morris observes in *McLeod* v. *St. Aubyn* (1), Courts may be satisfied sometimes to leave to public opinion attacks or comments derogatory or scandalous to them. But I do not accede to the argument that it is invariably prudent for the Court to assume an attitude of indifference or to institute regular criminal proceedings against the offender. In this connection, reference may appropriately be made to the weighty words of Kent C. J. in *Yates* v. *Lansing* (2). "Whenever we subject the established Courts of the land to the degradation of private prosecution, we subdue their importance and destroy their authority. Instead of being venerable before the public, they become contemptible ; and we thereby embolden the licentious to trample upon everything sacred in society and to overthrow those institutions which have hitherto been deemed the best guardians of Civil liberty." [See also the very pertinent observations of Marshall J. *in State* v. *Shepherd* (3) quoted in *Legal Remembrancer* v. *Matilal Ghose* (4)]. In my opinion, this Court has undoubted jurisdiction to deal summarily with persons who have committed contempt by scandalous attack upon the Judges, and such power should be exercised in the present instance. When I hold this, I do not overlook the assertion of the printer and publisher that the articles before us were published by him in good faith and in the public interest. The sincerity of

(1) [1899] A. C. 549, 561.
(2) (1810) 5 Johnson N. Y. 282.
(3) (1900) 113 Geo. 114 ; 15 L. R. A. 225.
(4) (1913) I. L. R. 41 Calc. 173, 246.

1917

MOTI LAL GHOSE AND OTHERS, *In re.*

MOOKERJEE J.

this plea appears to me to be open to the gravest doubt. But, even on the assumption that the allegation is literally true, I desire to add that, while I do not underrate in the least degree the importance of the liberty of the press, I cannot hold it expedient that any class of the community should be privileged to attack the Courts so as to interfere with the rights of litigants or to embarrass the administration of justice. The publishers of newspapers have the right, but no higher right than others, to bring to public notice the conduct of Courts, and, *provided the publications are true and fair in spirit*, there is no law to restrain the freest expression of the disapprobation that any person may entertain of what is done in or by the Courts. But liberty of the press must not be confounded with license or abuse of that liberty, and though it may be true that where the liberty of the press and freedom of public comments end, there tyranny begins, it is at least equally true that where vituperation begins, there the liberty of the press ends; and the inherent power of the Supreme Courts of Record to punish any publication calculated to interfere with the administration of justice cannot be deemed in any way restricted by considerations of the kind urged by the printer and publisher.

As regards the third question, namely, what is the true nature of the present proceeding, is it civil or criminal in character, the matter is of practical importance from the point of view of the mode of trial to be adopted. In the case of *Legal Remembrancer* v. *Matilal Ghose*(1), I had occasion to examine fully the distinction between a criminal and a civil contempt which is of a fundamental character. A criminal contempt is conduct that is directed against the dignity and authority of the Court. A civil contempt, on the

(1) (1913) I. L. R. 41. Calc. 172, 252.

other hand, is failure to do something ordered to be done by a Court in a civil action for the benefit of the opposing party therein. Consequently, in the case of a criminal contempt, the proceeding is for punishment of an act committed against the Majesty of the Law, and, as the primary purpose of the punishment is the vindication of the public authority, the proceeding conforms, as nearly as possible, to proceedings in criminal cases. In the case of civil contempt, on the other hand, the proceeding in its initial stages at least, when the purpose is merely to secure compliance with a judicial order made for the benefit of a litigant, may be deemed instituted at the instance of the party interested and thus to possess a civil character. But here also, refusal to obey the order of the Court may render it necessary for the Court to adopt punitive measures against the person who has defied its authority; at that stage, at least, the proceedings may assume a criminal character. In this manner, the dividing line between acts which constitute criminal and others which constitute civil contempts may become indistinct in those cases, where the two gradually merge into each other: *In re St. James Evening Post* (1), *Scott.* v *Scott.* (2), *Charlton's Case* (3), *In re Wallace* (4), *In re Davies* (5), *Onslow's Case* (6), *Skipworth's Case* (7). A careful scrutiny of the cases in the books shows, however, that much confusion exists in the reported decisions as to whether or not contempt proceedings are civil or criminal, where the contempt is committed in relation to a civil proceeding, and, it is consequently

(1) (1742) 2 Atk. 469; 26 Eng. Rep. 633.
(2) [1913] A. C. 417.
(3) (1836) 2 My. & Cr. 316.
(4) (1866) L. R. 1 P. C. 283.
(5) (1888) 21 Q. B. D. 236.
(6) (1873) L. R. 9 Q. B. 219.
(7) (1873 L. R. 9 Q. B. 230.

1917

MOTI LAL GHOSE AND OTHERS, *In re.*

MOOKERJEE J.

desirable to investigate briefly the true test for differentiation.

The power to punish for contempt is inherent in the very nature and purpose of Courts of justice. It subserves at once a double purpose, namely, as an aid to protect the dignity and authority of the tribunal and also as an aid in the enforcement of civil remedies. The power may consequently be exercised in civil or criminal cases or independently of both, and either solely for the preservation of the authority of the Court or in aid of the rights of the litigant or for both these purposes combined. By reason of this two-fold attribute, proceedings in contempt may be regarded as anomalous in their nature, possessed of characteristics which render them more or less difficult of ready or definite classification in the realm of judicial power. Hence such proceedings have sometimes been styled *sui generis*. That they are largely of a criminal nature, inasmuch as the Court has power to convict and punish for the wrong committed, cannot be disputed, and yet it must be recognised that in some respects, by reason of the end subserved, they partake of the nature of a civil remedy. This dual characteristic has given rise to many controversies, specially when questions have arisen as to right of appeal from the order passed [*The Queen* v. *Barnardo* (1), *Barnardo* v. *Ford* (2), *Helmore* v. *Smith* (3), *A. G.* v. *Kissance* (4), *Hunt* v. *Clarke* (5), *R.* v. *Staffordshire* (6), *O Shea* v. *O'Shea* (7), *Bessette* v. *Conkey and Co.* (8), *In re Christensen Engineering Co.*(9), *Warden* v. *Searls* (10), *Gompers* v. *Bucks' Stove Co.* (11)], the applicability

(1) (1889) 23 Q. B. D. 305.
(2) [1892] A. C. 326.
(3) (1886) 35 Ch. D. 449.
(4) (1893) 32 L. R. Ir. 220.
(5) (1889) 58 L. J., Q. B. 490.
(6) (1888) 57 L. J., Q. B. 483.
(7) (1890) 15 Prob. Div. 59.
(8) (1904) 194 U. S. 324.
(9) (1904) 194 U. S. 458.
(10) (1886) 121 U. S. 14.
(11) (1911) 221 U. S. 418.

of rules of evidence [*Celluloid Co.* v. *Chrolithian Co.* (1), *Bullock Co.* v. *Westing House Co.* (2), *Ex parte Gould* (3)], the finality of the judgment, [*Fisher* v. *Hays* (4), *In re Mullee* (5)], liability for payment of costs [*In re Cornish* (6), *In re Martindale* (7), *Day* v. *Longhurst* (8)], right of trial by Jury, [*Tinsley* v. *Anderson* (9), *In re Debs* (10), *Eilenbecker* v. *Plymouth Court* (11)], and other like matters. The difficulty in each case is to determine when a particular proceeding assumes the criminal rather than the civil aspect, or when of both, and, if the latter, which feature must control. The question has been repeatedly and elaborately discussed by the Supreme Court of the United States: *Ex parte Kearney* (12), *New Orleans* v. *Steam Ship Co.* (13), *In re Chiles* (14), *Hayes* v. *Fisher* (15), *Warden* v. *Searls* (16), *Ex Debs* (10), *O'Neal* v. *U. S.* (17), *In re Christensen Engineering Co.* (18), *Bessette* v. *Conkey Co.*(19), *Doyle* v. *London Guarantee Co.* (20), *Gompers* v. *Buck's Stove Co.* (21). The view deducible from these decisions is in general agreement with what is indicated above, namely, a proceeding to punish for contempt has the essential qualities of a criminal proceeding, whether the proceeding is initiated primarily to vindicate the Court's authority or

(1) (1885) 24 Fed. 585.
(2) (1904) 63 C. C. A. 607; 194 U. S. 636.
(3) (1893) 99 Cal. 360; 21 L. R. A. 751; 37 Am. St. Rep. 57.
(4) (1881) 19 Blatch 13; 6 Fed. 63.
(5) (1869) 7 Blatch 23; 17 Fed. Cas. 9911.
(6) (1893) 9 T. L. R. 196.
(7) [1894] 3 Ch. 193.
(8) (1892) 62 L. J. Ch. 334.
(9) (1898) 171 U. S. 101.
(10) (1894) 158 U. S. 564.
(11) (1889) 134 U. S. 31.
(12) (1882) 7 Wheaton 38.
(13) (1874) 20 Wallace 387.
(14) (1874) 22 Wallace 157.
(15) (1880) 102 U. S. 121.
(16) (1886) 121 U. S. 14.
(17) (1903) 190 U. S. 36.
(18) (1904) 194 U. S. 458.
(19) (1904) 194 U. S. 324.
(20) (1907) 204 U. S. 599.
(21) (1911) 221 U. S. 418.

1917

MOTI LAL GHOSE AND OTHERS, *In re.*

MOOKERJEE J.

solely as a coercive and a remedial measure to enforce the rights of the litigant or for both these purposes combined. This must be so, since it necessarily results from the nature of the power to punish for contempt that whatever the primary purpose of such a proceeding may be, it is always within the power of the Court to make its judgment in part, at least, punitive or vindicatory in character; in other words, where the sole purpose sought by initiating the proceeding is to secure the coercive and remedial action of the Court against a party, the Court may, nevertheless, in its discretion, add a punishment, by way of fine or imprisonment, for the failure of the person in contempt to obey its mandate. I think it undeniable that the proceeding must be regarded from its inception to the point of judgment, as of a criminal nature, or, at least, potentially so, since, until the judgment is given, it cannot be known what its character will be. It is the judgment, therefore, which must eventually in any case determine the character of the proceeding, and this leads to the conclusion that logically, perhaps, instead of characterising contempt proceedings as criminal or remedial according to circumstances, it is contempt judgments that should be so classified. In any view, there is no room for controversy that where, as here, the contempt consists in an attack upon the Court, the proceedings, instituted to vindicate its dignity, are of a criminal nature, even though the attack has been made in connection with civil suits or appeals, either actually decided or pending or about to be taken up for disposal: *Legal Remembrancer* v. *Matilal Ghose* (1).

As regards the fourth question, we have to consider separately the liability of each of the five persons who-

(1) (1913) I. L. R. 41 Calc. 173.

have been called upon to show cause why they should not be committed for contempt of Court. Tarit Kanti Biswas has filed an affidavit to the effect that he is the printer and publisher of the *Amrita Bazar Patrika* and that in such capacity he printed and published the articles mentioned. He states, however, that he exercises no control whatever over the contents of the newspaper, that he did not read the articles when they were handed over to him for publication, that he did not consider, at any time prior to publication, their meaning or purport, that he inserted them in the paper in the usual course of business, that he acted *bonâ fide* and was not actuated by a disrespectful or other improper feeling or motives towards the Court or the Chief Justice, and that he did not intend to excite contempt or to reflect in any way upon the integrity or dignity of the Court or of the Chief Justice in his administration thereof. Notwithstanding this defence, there can be no doubt as to the liability of the printer and publisher; for as Lord Morris observed in *McLeod* v. *St. Aubyn* (1), a printer and publisher intends to publish and so intending cannot plead as a justification that he did not know the contents. Indeed, this has been the settled law ever since the decision of Lord Hardwicke in *In re St. James Evening Post* (2), which was followed by Lord Erskine in *Ex parte Jones* (3), and by Stirling J. in *In re the American Exchange in Europe* (4), [*Cheshire* v. *Strauss* (5), *R.* v. *Parke* (6), *Emmens* v. *Pottle and others* (7), *R.* v. *Davies* (8), *Daw* v. *Eley* (9), *Tichborne* v. *Tichborne* (10), *In re*

(1) [1899] A. C. 549, 562.
(2) (1742) 2 Atk. 469.
(3) (1806) 13 Ves. 237, 239.
(4) (1889) 58 L. J. Ch. 706.
(5) (1896) 12 T. L. R. 291.
(6) [1903] 2 K. B. 432.
(7) (1885) 16 Q. B. D. 354, 357.
(8) [1906] 1 K. B. 32.
(9) (1868) L. R. 7 Eq. 49.
(10) (1868) L. R. 7 Eq. 55; 15 W. R. 1072.

1917

MOTI LAL GHOSE AND OTHERS, *In re.*

MOOKERJEE J.

Cheltenham, etc., Railway, etc., Co. (1), *Littler* v. *Thomson* (2)]. The Rule must consequently be made absolute against the printer and publisher. With regard to his allegation that he had no intention whatever to offend the dignity or integrity of the Court and that in reality he was helpless in the position he occupied as a servant of the company, one cannot but feel that the value of such assurance is considerably discounted by the fact that he has given no information to the Court. I am not unmindful that, as ruled in *In the matter of a Special Reference from the Bahama Islands* (3), he was under no legal obligation to assist the Court in any way, and to disclose the name of the persons primarily responsible for the articles; still his conduct serves to throw doubt in a considerable measure on the genuineness of his profession that he had no intention to prejudice the due course of administration of justice or to cast any reflection on the Judges of this Court. He must accordingly take the consequences of his act, and cannot reasonably urge that he has established a claim for specially considerate treatment. See the observations of Stirling J. in *In re The American Exchange in Europe* (4).

As regards the other four defendants, it is necessary to state that they have not all taken up the same attitude in this matter. Counsel on behalf of Moti Lal Ghose declined to answer, as he was entitled to do, the question put by me, whether he was in reality one of the directors of the company as stated in the return of Golap Lal Ghose alleged to have been filed under section 32 of the Indian Companies Act, 1913. Pijush Kanti Ghose has filed an affidavit in which he admits that he is one of the directors of

(1) (1869) L. R. 8 Eq. 580.
(2) (1839) 2 Beav. 129.
(3) [1893] A. C. 138, 149.
(4) (1889) 58 L J. Ch. 706, 708.

the company, but that neither he nor his co-directors exercise any control over the contents of the newspaper and perform such duties and exercise such powers only as are mentioned and defined in the Articles of Association. He further alleges that he was absent from Calcutta from the 21st May to the 4th June and was not here on the date when the second article appeared. Mrinal Kanti Ghose has filed a similar affidavit, in which he admits that he is the secretary of the company. He further alleges that Moti Lal Ghose, Golap Lal Ghose, and Pijush Kanti Ghose are directors of the company, that Golap Lal Ghose is also the financial manager, that neither he nor the directors nor the financial manager exercises any control whatever over the contents of the paper, and that the directors perform such duties and exercise such powers only as are mentioned and defined in the Articles of Association (extracts wherefrom are appended to the affidavit). He enumerates also the duties of the secretary and of the financial manager, and finally adds that he was absent from Calcutta from the 4th May to the 22nd May and was not here on either of the two dates when the articles mentioned appeared. Golap Lal Ghose has not filed any affidavit, and on his behalf counsel has contended that there is no legal evidence whatever to connect him in any way with the publication of either article. This argument is based on three grounds, namely, *first*, that secondary evidence of the return alleged to have been filed under section 32 of the Indian Companies Act was not admissible; *secondly*, that even if secondary evidence were held admissible, evidence was requisite to prove that the original had been filed by Golap Lal Ghose, who is the director and financial manager of the company and has been called upon to show cause; and, *thirdly*, assuming but not admitting that he was a manager on

1917

MOTI LAL GHOSE AND OTHERS, *In re.*

MOOKERJEE J.

the 5th March 1917, as stated in the return, there is no evidence that he was manager on either of the dates when the offending articles were published.

Before I deal with these objections and their effect upon the Rule, I may make the preliminary observation that the materials which were placed before the Court when the Rule was issued amply justified the action then taken, indeed, made it in a manner incumbent upon the Court to follow the course actually adopted. These materials showed that the *Amrita Bazar Patrika* was the property of a company called the "Amrita Bazar Patrika, Limited", incorporated under the Indian Companies Act, 1882, on the 19th November 1908, that one of the objects for which the company was established was to acquire and take over as a going concern the business of newspaper proprietors, printers, and publishers then carried on in connection with the paper; that the registered office of the company was at No. 2, Ananda Chatterjee's Lane, where the newspaper was published, and where many of the shareholders and directors who were closely related to each other lived; and that on the 5th March 1917, the directors and managers were the persons mentioned in the return filed by the secretary under the provisions of the Indian Companies Act. In these circumstances, there was a strong *primâ facie* case against the defendants that they were connected with and responsible for the publication of the articles in question. But although these materials were sufficient to justify the issue of a Rule, on careful scrutiny and on examination of the allegations in the affidavits filed in answer to the Rule, I see no escape from the conclusion that an order cannot properly be made against any of the defendants other than the printer and publisher.

With reference to the legal objections just enumerated, I am not prepared to accede to the contention that secondary evidence of the returns in the custody of the Registrar of Joint Stock Companies is not admissible. Section 65, clause (*e*) of the Indian Evidence Act, provides, that secondary evidence may be given of the contents of a document when the original is a public document within the meaning of section 74. Section 74, sub-section (*2*), provides that public records kept in British India of private documents are public documents. The question consequently reduces to this, whether the returns in the custody of the Registrar of Joint Stock Companies constitute public records of private documents. The observation of Lord Blackburn in *Sturla* v. *Freccia* (1), is of no assistance in the solution of this question, and does not show that a public record of a private document is limited to an entry made in a book by a public officer, which reproduces the contents of the document and thus constitutes a written memorial made by the public officer authorised by law to perform that function. The term "record," as appears from the Oxford Dictionary (Vol. VIII, 266), has a more comprehensive meaning and includes a collection of documents. When, as in the case of the Indian Companies Act, the Legislature has provided that returns are to be lodged with a public officer, these returns, when transmitted to and filed by him, do constitute public records of private documents within the meaning of section 74, sub-section (*2*), although they are not copied out by the Registrar of the Joint Stock Companies into a volume kept for the purpose; they are undoubtedly intended for reference and use by the public. But though this objection is of no avail, the second exception

(1) (1880) L. R. 5 A. C. 623, 642.

1917

MOTI LAL GHOSE AND OTHERS, *In re.*

MOOKERJEE J.

is well founded; for although secondary evidence may be admissible, the party who produces the evidence is not relieved of his obligation to prove the execution of the document, just as if the original had been produced, unless the case is covered by section 90 of the Indian Evidence Act or the Legislature has expressly provided that the document or endorsement thereon is receivable in evidence without proof of execution, as, for example, in section 60 of the Indian Registration Act. Consequently, as against Moti Lal Ghose and Golap Lal Ghose, there is no legal evidence to establish that the former is a director and the latter a manager of the company. The statements made by Pijush Kanti Ghose and Mirnal Kanti Ghose in the affidavits filed by them at the hearing, cannot fairly be used to the detriment of other defendants, as the proceeding is in the nature of a criminal trial. Besides, as pointed out in the case of *Legal Remembrancer* v. *Matilal Ghose* (1) on the authority of the decision in *The Queen* v. *Stranger* (2), supplementary evidence cannot be given so as to prejudice the position of the accused. To the same effect are the observations made by Wright J. in *In re Hooley*(3), when he was asked to grant leave to amend a notice of motion to commit a company for contempt of Court: "That is not the way in which the Court deals with matter of this kind, affecting the liberty of of the subject. Applicants must come with their machinery ready." The procedure should be at least equally strict and adherence to the forms of the law at least equally scrupulous, when the Court finds itself in the position of Prosecutor and Judge and an unexpected lacuna in the evidence transpires during the trial. The Court must act with great caution in

(1) (1913) I. L. R. 41 Calc. 173, 178. (2) (1871) L. R. 6 Q. B. 352.
(3) (1899) 6 Manson 44, 46.

strict conformity with the requirements of the law and avoid a perhaps not unnatural tendency to supplement the evidence: *Martin* v. *Mackonochie* (1). As regards the third legal objection, however, I am not convinced that there is any substance in the argument. Section 87 of the Indian Companies Act requires that notice of changes among the directors or managers shall be filed from time to time. The certified copy of the return furnished by the Registrar of Joint Stock Companies must therefore be presumed to embody the latest changes. Consequently, if the return had been duly proved, it would have furnished *primâ facie* evidence of the names of the directors and managers on the day the copy was supplied. But this point is immaterial, as in my opinion there is no legal evidence to connect Moti Lal Ghose and Gopal Lal Ghose with the publication of the articles.

There remains for examination the case of Mirnal Kanti Ghose and Pijush Kanti Ghose, who admit that they are directors. But they assert in their respective affidavits that none of the directors nor the financial manager exercises any control whatever over the contents of the paper. There are no materials at the disposal of the Court sufficient to contradict these statements made on oath; consequently, the denial is, in the circumstances, a sufficient answer to the Rule. I cannot but observe, however, that the further assertion in the affidavits of these two persons that the directors perform such duties and exercise such powers only as are mentioned and defined in the Articles of Association detracts to some extent at least from the value of the previous statement. The Articles of Association show that the business of the company is required to be managed by the directors, while the Memorandum of Association shows that the object for

(1) (1878) 3 Q. B. D. 730, 775.

1917

MOTI LAL GHOSE AND OTHERS, *In re.*

MOOKERJEE J.

which the company was established was to acquire and take over as a going concern the business of newspaper proprietors, printers and publishers then carried on in connection with the *Amrita Bazar Patrika*. Consequently, the memorandum and Articles of Association taken together may imply that it was the duty of the directors to manage the publication of the paper, and from this point of view they might be held responsible for the publication of the articles mentioned. This inference might possibly be strengthened by the circumstance that the existence of an editor is not mentioned, not even so much as suggested in these proceedings. But although the case may, in these circumstances, be one of strong suspicion, it is impossible to hold that, notwithstanding the categorical denial to the contrary, it has been established beyond doubt that the directors were responsible for or connected with the actual publication of the two articles. We cannot possibly hold, as a matter of law, that the directors of a limited company, which owns a newspaper, are liable to be committed for contempt of Court on account of a libel published in the paper: *R.* v. *Judd* (1). The decision in *Ex parte Green* (2) cannot be treated as an authority for a general proposition of law that where a limited company disseminates amongst newspapers matter amounting to contempt of Court, their manager, merely because he was the manager, was liable to be committed. The decision rested, I think, on the facts admitted or established before the Court, which showed that the manager was in fact responsible for all the paragraphs sent out to newspapers. Nor can we apply to the case before us the presumption which at one time was applied in England as to the responsibility of the

(1) (1888) 37 W. R. 143; 10 Cox 559.

(2) (1891) 7 T. L. R. 411.

proprietor of a newspaper for libels published in his paper. The view that the proprietor of a newspaper was answerable, criminally as well as civilly, for the acts of his servants or agents in misconducting a newspaper, enunciated by Lord Kenyon in *Rex* v. *Walter* (1), and restated by Lord Ellenbrough C.J. in *R.* v. *White* (2) and by Lord Tenterden C.J. in *R.* v. *Gutch Fisher* (3), has long been obsolete in England [*The Queen* v. *Holbrook* (4), *The Queen* v. *Holbrook* (5)] and should unquestionably not be applied in this country in a case of the description now before us, even though it be held applicable to trials for defamation under the Indian Penal Code: *Ramaswami* v. *Lokanada* (6), *Gadicherla Harisarroothama Rao* v. *King Emperor* (7). After anxious consideration of all the materials on the record, I have thus arrived at the conclusion that the Rule must be discharged also as against Mrinal Kanti Ghose and Pijush Kanti Ghose.

I cannot consider the result of this trial satisfactory from the vital point of view indicated by Lord Hardwicke in *The St. James Evening Post Case* (8), namely, that there cannot be anything of greater consequence than to keep the stream of justice clear and pure so that parties may proceed with security both to themselves and their characters. The persons responsible for the grave contempt of Court which has been committed have not been brought to justice. This is not a matter for legitimate surprise, as the Court has not the machinery at its disposal for the discovery of the offenders, and the materials available from the public records have proved insufficient for the purpose.

(1) (1799) 3 Esp. 21.
(2) (1811) Holt on Libel 287.
(3) (1829) 1 Moo. & Malk. 433, 437.
(4) (1877) 3 Q. B. D. 60; 13 Cox. 550.
(5) (1878) 4 Q. B. D. 42; 14 Cox 185.
(6) (1885) I. L. R. 9 Mad. 387, 389.
(7) (1909) I. L. R. 32 Mad. 338.
(8) (1742) 2 Atk. 469.

1917

MOTI LAL GHOSE AND OTHERS, *In re.*

MOOKERJEE J.

At the same time, the offenders have preferred to keep themselves in the dark and have not adopted the eminently honourable course which was pursued in two other instances in this Court and which evoked the just commendation of Sir Barnes Peacock and Sir Richard Garth respectively: *In re Banks and Fenwick* (1) and *Surendra Nath Banerjee* v. *Chief Justice of Bengal* (2). They have not had the courage to come forward to avow their responsibility and either to justify their action or to express contrition for their misconduct. Even the directors of the company have contented themselves with a disavowal of their responsibility and have expressed no regret whatever for the articles published in a newspaper owned by the company. In these circumstances, it is undoubtedly worthy of consideration whether legislative provision should not be made to compel registration of the name of the editor and proprietor of a newspaper, precisely in the same way as that of the printer and publisher (Stat. 44 & 45 Vict. c. 60). It may finally be observed that on a recurrence of a case of this character, the Court may find it necessary to proceed against the company, as has been done in some recent instances. No doubt, the view was maintained at one time that a corporation could not be held liable for contempt of Court as by reason of its impersonal nature it could not be attached: *Guilford* v. *Mills* (3). But the weight of modern authority is apparently against this doctrine, and the view has been maintained that proceedings by way of contempt would lie against corporations as well as individuals; in the case of individuals, the process is by attachment of the person, followed by fine or imprisonment or both; in the case of

(1) (1869) 26 C. L. J. 401, 457.

(2) (1883) I. L. R. 10 Calc. 109; L. R. 10 I. A. 171.

(3) (1666) 2 Keb. 1; T. Raym. 152.

corporations, the process is by fine followed by sequestration or distraint: *R.* v. *Birmingham Ry. Co.* (1), *Loudon* v. *Lynn* (2), *Spokes* v. *Banbury Local Board* (3). The decision of Wright J. in *In re Hooley* (4), is seemingly an authority only for the proposition that a limited company cannot be committed to prison for contempt; it does not decide the question, whether such a company may not be fined for contempt of Court and the fine recovered by distraint or sequestration. In the Courts of the United States, the liability of a Corporation for contempt has been affirmed by a large preponderance of authority: *Bloomington Church* v. *Muscatine* (5), *West Jersey Co.* v. *Board of Public Works* (6), *U. S.* v. *Memphis Ry. Co.* (7), *In re Realty Corporation* (8), *Union* v. *People* (9), *Stratton* v. *Meriwether* (10), *Schreiher* v. *Garden* (11), *State* v. *Ry. Co.* (12). One of the most recent cases in which the question is examined as one of principle is that of *Fiedler* v. *Banbrick Bros.* (13), where, upon an elaborate review of earlier decisions, the conclusion was reached that Corporations, though not liable to be imprisoned, were liable to be fined by way of punishment for contempt of Court. (See also Rapalje on Contempts, section 48 and High on Injunctions, section 1460). It is not necessary for me to decide finally on this occasion the liability of Corporations to be punished for contempt of Court in their corporate capacity; but in view of the turn events have taken in the present proceedings, it is desirable to point out

(1) (1844) 3 Q. B. 223.
(2) (1789) 1 H. Bl. 206.
(3) (1865) 11 Jurist N. S. 1010.
(4) (1899) 6 Manson 44.
(5) (1855) 2 Iowa 69.
(6) (1896) 58 N. J. L. 536; 37 Atl. 578.
(7) (1881) 6 Fed. 237.
(8) (1908) 108 N. Y. Sup. 551.
(9) (1887) 121 Illinois App. 647.
(10) (1913) 154 Ky. 839, 159; S.W. 613.
(11) (1912) 137 N. Y. Sup. 747.
(12) (1913) 73 W. Va. 1; 79 S. E. 834.
(13) (1912) 162 Missouri App. 523: 142 S. W. 1111.

1917

MOTI LAL GHOSE AND OTHERS, *In re.*

MOOKERJEE J.

that when a grave contempt of Court has been committed by a newspaper owned by a company, the immunity from punishment which the offenders may imagine they enjoy by reason of stolid silence, is most probably of an illusory character.

My conclusion is that the Rule must be made absolute against the printer and publisher, but discharged against all the other defendants.

CHITTY J. I have had the advantage of reading the judgments just delivered by my Lord the Chief Justice and Mr. Justice Woodroffe and I entirely agree with what they have said generally about the case and the orders to be passed with regard to the several respondents. I wish, however, to state with regard to Babu Moti Lal Ghose that I should have been disposed to hold him responsible for the articles in question, as one who has been proved to be a director of this company, and who in that capacity has been called upon by this Court to show cause, and has shown none. As the majority of the Bench are in favour of giving him the benefit of the doubt, I do not desire to press my opinion further. I therefore concur in the order about to be passed.

Mr. Justice Fletcher, who is unavoidably absent today, desires me to say that he too was prepared to hold Babu Moti Lal Ghose responsible, but under the circumstances he also concurs in the order to be passed.

[The following order was, thereupon, passed by the Court :]

SANDERSON C.J. Tarit Kanti Biswas ! The members of the Court are unanimously of opinion that in printing and publishing the two articles in question in the *Amrita Bazar Patrika* newspaper, you were guilty of a contempt of Court.

The serious nature of it has been referred to in the judgments which have been delivered, and it is not necessary therefore for me to recapitulate what has already been said.

In the earlier part of your affidavit you state that you did not read the articles when they were handed to you for publication and that you inserted them in the usual course of your business as printer and publisher.

Later, however, in your affidavit you proceeded to try and justify the publication of the articles by alleging that they were published by you in good faith and in the public interest, a position which we consider inconsistent with that of a man who puts forward the case that he printed and published the articles in ignorance of their contents.

We are all of opinion there was not the smallest justification for the publication of such untrue statements and unjustifiable imputations as were contained in the articles.

If the person responsible for the publication of these articles had come forward and had taken the responsibility upon himself, or if you had disclosed to the Court the person who was really responsible for the publication, which must have been within your knowledge, although you might not have known the actual writer of the article, it might have been possible for us to treat the offence in your case with such leniency as your learned counsel prayed for.

The person really responsible, however, has not been disclosed, but you, being the printer and publisher, whose identity could not be concealed and whose legal liability could not be denied, are left by your employers to bear the brunt of this matter.

We have taken all these matters into consideration; the contempt of Court, however, in our judgment was

1917

MOTI LAL GHOSE AND OTHERS, *In re.*

SANDERSON C.J.

of such a nature that in the interest of the administration of justice it is impossible for us to pass it over without some penalty.

It is essential to vindicate the authority of the Court and to make it clear that articles such as those in question constituting a grave contempt of Court cannot be published with impunity.

Tarit Kanti Biswas! The judgment of the Court is that you, Tarit Kanti Biswas, do pay to the Accountant-General of this Court a fine of Rs. 300 before 4-30 P.M. to-day, and that you be detained until such hour, or until such time as the fine is paid: and if the fine is not paid as herein directed, you be lodged on the civil side of the Presidency Jail until the said fine is paid or until the further order of this Court.

WOODROFFE, MOOKERJEE, CHITTY AND FLETCHER JJ. concurred.

Rule discharged against all but the Printer.

G. S.

Attorneys for the defendants: *H. N. Dutt; N. N. Mitter; D. C. Mitter.*

LETTERS PATENT APPEAL.

Before Sanderson C. J. and N. R. Chatterjea J.

BIJOY SINGHA DUDHURIA

v.

KRISHNA BEHARI BISWAS.*

1917

March 28.

Illegal Cess—Abwab—Suit for Arrears of rent—Consideration for grant of patni—Stipulation in kabuliat to pay sum as mamuli for the idol Isswar Thakur—Recovery of Rents Act (Beng. X of 1859) s. 10—Regulation VIII of 1793, ss. 52, 54—Regulation V of 1812, s. 3.

In a suit to recover Rs. 3,330-4 as arrears of *patni* rent, the defendants pleaded that Rs. 15 had been claimed in excess and that this sum was in the nature of an *abwab* and not recoverable. The *kabuliat* on which this suit was based provided that an annual rent of Rs. 3,315-4 should be paid by 12 monthly instalments. In a subsequent clause it stipulated that in the month of *Bhadra* every year a further sum of Rs. 15 should be paid as *mamuli* for the *Isswar Thakur* at the lessor's house and then went on to state that if the lessee failed to pay the said sum of Rs. 15 amicably, the lessor should deduct the same from the money remitted by the lessee as rent, or sue for the amount along with or separately from the arrears of rent, and the lessee would not take objections thereto :—

Held, that the sum of Rs. 15 was not intended by the parties to be part of the consideration for the use and occupation of the land or as part of the rent. It did not form part of the rent, nor was it treated as part of the rent and was not recoverable.

Held, also, that s. 3 of Regulation V of 1812 referred only to the amount which was by the contract fixed as the rent payable to the landlord.

Per SANDERSON C. J. The rule which has been followed in this Court is, that each case must depend upon the proper construction of the contract before the Court and, if upon a fair interpretation of the contract it can be seen that a particular sum is specified in the contract, or agreed to be paid as the lawful consideration for the use and occupation of the land, *i.e.*, if it

* Letters Patent Appeal, No. 23 of 1916, in Appeal from Appellate Decree No. 3881 of 1913.

1917

BIJOY SINGHA DUDHURIA v. KRISHNA BEHARI BISWAS.

is really part of the rent, although not described as such, the landlord can recover it.

Per CHATTERJEA J. It is only the rent, and not any other sum though not indefinite, and though agreed upon to be paid in the written engagement, which can be recovered.

In determining whether an item does or does not form part of the rent, the fact that it has been stipulated to be paid separately from the rent, and also the fact that it is not included in the instalments of rent, have an important bearing on the question.

Upendra Lal Gupta v. *Meheraj Bibi* (1) explained.

APPEAL under section 15 of the Letters Patent, by Raja Bijoy Singha Dudhuria, the plaintiff, from the judgment of Newbould J.

On the 7th April 1883, one Roy Dhanpat Singh Bahadur created a *patni* tenure in respect of a certain *mehal* in favour of one Ram Saran Biswas. Under the *kabuliat* it was provided that an annual rent of Rs. 3,315-4 was payable in 12 monthly instalments by the *patnidar* to the *zemindar*. In a subsequent clause in the document it was stipulated that in the month of *Bhadra* each year a sum of Rs. 15 should be paid as the *mamuli* for the family idol, *Isswar Thakur*, in addition to the above sum by the *patnidar* at the *zemindar's* house at Azimganj and that if he failed to pay the said sum amicably, then the *zemindar* should deduct the same from the money remitted by the *patnidar* as rent or sue for the amount along with or separately from the arrears of rent and he would not take objections thereto. Thereafter, Roy Dhanapat Singh Bahadur sold the *mehal* to Raja Bijoy Singha Dudhuria. The payment of rent having run into arrears, Raja Bijoy Singha Dudhuria instituted a suit for the recovery of the sum of Rs. 3,330-4 as arrears of *patni* rent from Krishna Behari Biswas and another, who are the successors in interest of the

(1) (1916) 21 C. W. N. 108.

original *patnidar*, Ram Saran Biswas. The defendants pleaded that Rs. 15 had been claimed in excess and that that sum was only an *abwab* and, therefore, not recoverable. Both the lower Courts dismissed the plaintiff's claim. The plaintiff then preferred a second appeal to the High Court, which was on the 28th January, 1916, tried by Mr. Justice Newbould sitting singly. Upon the second appeal being dismissed, the plaintiff preferred this appeal under s. 15 of the Letters Patent.

Babu Ram Chandra Mazumdar, for the appellant. The payment of the Rs. 15 was stipulated for in the lease creating the tenancy. It formed part of the consideration for the grant of the *patni*. It was a definite sum to be paid in terms of the *kabuliat*, and not an uncertain, indefinite or arbitrary cess, or an *abwab*. It was, therefore, recoverable. Regulation VIII of 1793, ss. 52 and 54 and Regulation V of 1812, s. 3, were referred to. Both the amount and the condition of the present lease were specific and s. 52 of the earlier Regulation applied. Section 3 of the latter Regulation did not stand in the way of the landlord recovering the amount in question. It formed part of the rent irrespective of its being set out in a separate clause in the lease and of its being payable not on the monthly instalment of rent, but annually. The recovery of rents under Act X of 1859, s. 10, referred to any sum outside the lease and did not affect the present case much. *Abwab* was defined in *Radha Prosad Singh* v. *Bal Kowar Koeri* (1) at page 759. That definition was inapplicable to the present case. In support of the appellant's contention that the amount in question was not an *abwab*, *Juggodish Chunder Biswas* v. *Turrikoollah Sircar* (2), *Mahomed Fayez Chowdhry* v. *Jamoo*

(1) (1890) I. L. R. 17 Calc. 726. (2) (1875) 24 W. R. 90.

1917

BIJOY SINGHA DUDHURIA v. KRISHNA BEHARI BISWAS.

Gazee (1), *Radha Charan Ray Chowdhury* v. *Golak Chandra Ghose* (2), *Sarat Chandra Ghosh* v. *Sham Chand Singh Roy* (3), *Kumar Kalanand Singh* v. *Eastern Mortgage Agency, Ld. Co.* (4), *Aparna Charan Ghose* v. *Karam Ali*(5), *Upendra Lal Gupta* v. *Meheraj Bibi* (6) and *Assanulla Khan Bahadur* v. *Tirthabashini* (7) were relied on. *Sonnum Sookul* v. *Shaikh Elahee Buksh* (8), *Krishna Chandra Sen* v. *Sushila Soondury Dassee* (9), *Chulhan Mahton* v. *Tilukdari Singh* (10), *Radha Prosad Singh* v. *Bal Kowar Koeri* (11), *Raj Narain Mitter* v. *Panna Chand Singh* (12), *Gayratulla Sardar* v. *Girish Chandra Bhaumik* (13), *Narendra Kumar Ghose* v. *Gora Chand Poddar* (14), *Mathura Prasad* v. *Tota Singh* (15) and *Kalar Singh* v. *Mathura Prosad* (16) were distinguished.

Babu Mahendra Nath Roy (with him *Babu Manmatha Nath Roy* and *Babu Sasadhar Roy*, Jnr.), for the respondents. When the rent was described as the total sum payable for the use and occupation of the land, it was recoverable; but when it was described as being made up of rent and another sum, or various other sums, then the sum, or sums, other than the rent was an *abwab* and not recoverable, notwithstanding the fact that such sum, or sums, was definite or specifically stated. In the present case there were two separate engagements, *viz.*, the payment of rent and

(1) (1882) I. L. R. 8 Calc 730.
(2) (1904) I. L. R. 31 Calc. 834.
(3) (1912) 16 C. L. J. 71.
(4) (1913) 18 C. L. J. 83.
(5) (1906) 4 C. L. J. 527; 10 C. W. N. 527.
(6) (1916) 21 C W. N. 108.
(7) (1895) I. L. R. 22 Calc. 680.
(8) (1867) 7 W. R. 453.
(9) (1899) I. L. R. 26 Calc. 611; 3 C. W. N. 608.
(10) (1885) I. L. R. 11 Calc. 175; (1889) I. L. R. 17 Calc 131.
(11) (1890) I. L. R. 17 Calc. 726.
(12) (1902) I. L. R. 30 Calc. 213; 7 C W. N. 203.
(13) (1906) 12 C. W. N. 175.
(14) (1906) I. L. R. 33 Calc. 683.
(15) (1912) I. L. R. 40 Calc. 806; 16 C. L. J. 296.
(16) (1913) 19 C. L. J. 402.

the payment of the amount of Rs. 15. Upon the construction of the lease the said sum of Rs. 15 was not considered to form part of the rent. It was agreed to be paid, not as part of the rent, or for the use and occupation of the land, but for something quite different. It was, moreover, payable annually and not with the monthly instalments of the rent. The payment of this sum was, therefore, illegal and it could not be recovered. *Chulhan Mahton* v. *Tilukdari Singh* (1) and *Radha Prosad Singh* v. *Bal Kowar Koeri* (2) were relied on. *Narendra Kumar Ghose* v. *Gora Chand Poddar* (3) could not be distinguished from the present case. Each case must, however, depend on its own merits. *Padmanund Singh Bahadur* v. *Baij Nath Singh* (4) and *Raj Narain Mitter* v. *Panna Chand Singh* (5) were referred to.

The appellants did not reply.

Cur. adv. vult.

SANDERSON C. J. This is an appeal from the judgment of Newbould J. whereby he affirmed the judgment of the first Appellate Court.

The plaintiff's claim was for Rs. 3,330 as arrears of rent. The defendants pleaded that the rent was Rs. 3,315 per annum and that the further sum of Rs. 15 claimed by the plaintiff was in the nature of an *abwab* and was not recoverable.

It appears that in 1883 a *kabuliat* was executed by Ram Saran Biswas, the predecessor in interest of the defendants, in favour of one Roy Dhanpat Singh Bahadur, who subsequently sold the *mehal* to the plaintiff.

(1) (1885) I. L. R. 11 Calc. 175 ; (1889) I. L. R. 17 Calc. 131.
(2) (1890) I. L. R. 17 Calc. 726.
(3) (1906) I. L. R. 33 Calc. 683.
(4) (1888) I. L. R. 15 Calc. 828.
(5) (1902) I. L. R. 30 Calc. 213.

1917

BIJOY SINGHA DUDHURIA v. KRISHNA BEHARI BISWAS.

SANDERSON C. J.

In this *kabuliat* the annual rental is stated to be Rs. 3,315-4, but it was further provided by the document that the defendants' predecessor should pay in the month of *Bhadra* every year the sum of Rs. 15 in respect of a *Thakur*. The words of the clause according to a translation, which was agreed upon by the learned vakils who argued the case, were as follows :—

"Besides this I shall continue to pay in the month of *Bhadra* of every year the sum of Rs. 15 as the *mamuli* (usual) for the *Isswar Thakur* at your house at Azimganj. If I fail to pay the aforesaid sum amicably then you shall deduct the same from the money remitted by me as the rent or sue for the amount along with or separately from the arrears of rent. I shall not take objections thereto."

The clause relating to the annual rental was near the beginning of this document, and the clause relating to the Rs. 15 was near the end of the *kabuliat*.

A schedule setting out 'details of instalments' was attached to the *kabuliat*. Therein the total *jama* was stated to be Rs. 3,315-4 and neither any of the monthly instalments nor the total included the payment of Rs. 15 in respect of the *Thakur*.

The learned Judge held that the sum of Rs. 15 could not be regarded as part of the rent but must be regarded as an irrecoverable *abwab*. From this decision the appeal has been brought.

It was argued on behalf of the appellant that the learned Judge's decision was wrong and that the Rs. 15 was recoverable because the liability to pay it was created at the same time as the *patni*, and in the same document, that the agreement to pay Rs. 15 was part of the consideration for the grant of the *patni*, that the said sum was neither an arbitrary

nor an indefinite cess within the meaning of section 3 of Regulation V of 1812 and that being so and the sum of Rs. 15 being part of the consideration for the *patni*, it could not be an *abwab*.

On the other hand, it was argued on behalf of the defendants that the sum of Rs. 15 was not part of the rent and was not money payable for the use and occupation of the land, but was a sum which was stipulated and understood by the parties as being additional to the rent and was therefore an *abwab*, even though the sum itself was not indefinite and though the clause relating to the payment thereof was definite.

The *kabuliat* was executed in 1883 and it was agreed by both sides that the matter was governed by section 3 of Regulation V of 1812. The words of the section are as follows :—

"Such parts of Regulation VIII, 1793, and of Regulation IV, 1794, as require that the proprietors of land shall prepare forms of *pottahs*, and that such forms shall be revised by the Collectors, and which declare that engagements for rent contracted in any other mode than that prescribed by the Regulation in question, shall be deemed to be invalid, are likewise hereby rescinded: and the proprietors of land shall henceforward be considered competent to grant leases to their defendant *talookdars*, under-farmers and ryots and to receive correspondent engagements for the payment of rent from each of those classes or any other classes of tenants, according to such form as the contracting parties may deem most convenient and most conducive to their respective interests. Provided, however, that nothing herein contained shall be construed to sanction or legalize the imposition of arbitrary or indefinite cesses, whether under the denomination of *abwab*, *mathote*,

1917

BIJOY SINGHA DUDHURIA v. KRISHNA BEHARI BISWAS.

SANDERSON C. J.

or any other denomination. All stipulations or reservations of that nature shall be adjudged by the Courts of Judicature to be null and void: but the Courts shall notwithstanding maintain and give effect to the definite clauses of the engagements contracted between the parties, or in other words, enforce payment of such sums as may have been specifically agreed upon between them."

There is no definition of the term *abwab* in the Regulation, but for the appellants it was argued that the accurate definition of the term *abwab* was that which was approved by O'Kinealy J. in his judgment in *Radha Prosad Singh* v. *Bal Kowar Koeri* (1) as follows:—

"The term is particularly used to distinguish the taxes imposed subsequently to the establishment of the *asul* or original standard rent in the nature of addition thereto. In many places they had been consolidated with the *asul* and a new standard assumed as the basis of succeeding impositions."

That being the meaning of the word, it was urged that it would not be applicable to the payment of Rs. 15 in this case: for it was agreed between the parties at the time the original rent was agreed, and in the very document by which the rent was reserved: and that inasmuch as the sum in question is neither arbitrary nor indefinite, and was part of the consideration for the *patni*, it can be recovered even though it cannot strictly be said to be part of the 'rent' agreed upon.

To this argument the respondents reply that unless it was part of the 'rent' or understood and agreed by the parties to be part of the 'rent' properly so called it cannot be recovered, and they rely principally upon two cases—first, a Full Bench decision in

(1) 1890) I. L. R. 17 Calc. 726, 759.

Chulhan Mahton v. *Tilukdari Singh* (1) and a decision of the Judicial Committee of the Privy Council in the same *Case* (2) and, second, *Radha Prosad Singh* v. *Bal Kowar Koeri* (3).

In my judgment, the actual decisions in these cases do not cover this case, though expressions of opinion in some of the judgments of the learned Judges in this Court are certainly material.

In the case of *Tilukdari Singh* v. *Chulhan Mahton* (2), the items in dispute were claimed as *abwabs* and the Judicial Committee's decision was, that the High Court was right in holding them to be *abwabs* and that if they were payable at the time of the Permanent Settlement they ought to have been consolidated with the rent under section 54 of Regulation VIII of 1793 and not being so consolidated they could not be recovered: and if they were not payable at the time of the Permanent Settlement, they would come under the description of new *abwabs* in section 55 and so would be illegal.

There was no written agreement, as in this case, providing for the payment of a definite sum, made at the same time as the agreement for rent, and the Judicial Committee did not decide the point now before us.

In the Full Bench case of *Radha Prosad Singh* v. *Bal Kowar Koeri* (3) the reference was:—

"Whether the portions of the claim that are objected to as coming under the denominations of *sarak*, *nej*, and *khuruch* are illegal cesses, or whether they are recoverable as rent by reason of their having been paid for a long time along with the rent and without any specification in the rent receipts?" And the Court held that the amounts sued for under the head of

(1) (1885) I. L. R. 11 Calc. 175. (2) (1889) I. L. R. 17 Calc. 131.
(3) (1890) I. L. R. 17 Calc. 726, 759.

1917

BIJOY SINGHA DUDHURIA v. KRISHNA BEHARI BISWAS.

SANDERSON C. J.

sarak, *nej* and *khuruch* were *abwabs* and not recoverable.

The point now before us was not involved in this decision.

In this case, however, the judgments were of an elaborate nature and entered upon a consideration of the subject of the recovery of *abwabs*, much of which was not necessary for the decision as was pointed out by O'Kinealy J. at page 742.

The opinions of these learned Judges, however, even though not strictly necessary for the decision of the case, must carry great weight and the majority seem to have come to the conclusion that the last four lines of section 3 of Regulation V of 1812 referred to the ground rent of the permanent settlement, confirming in this respect Mitter J.'s opinion in *Chulhan Mahton* v. *Tilukdari Singh* (1), where he said "this provision refers only to the amount which is by the contract fixed 'as the rent payable to the landlord.'"

This is the view as to the construction of the section which seems to have been acted upon in this Court since 1885 and whatever one's own views might have been, if the matter were free from Judicial opinion, I do not think it would be right for us sitting in a Division Bench of this Court to depart from a construction which has been adopted for so many years.

In *Radha Prosad Singh* v. *Bal Kowar Koeri* (2), Petheram C.J., however, went further and expressed his opinion as follows—

"By this judgment I understand the Privy Council, while affirming that of the High Court, to go beyond it and to hold that under the Regulations nothing could be recovered for the occupation of land, except one sum which must include everything which was

(1) (1885) I. L. R. 11 Calc. 175, 184. (2) (1890) I.L.R. 17 Calc. 726, 739.

payable for such occupation arrived at either by agreement or by some judicial determination between the parties, and that any contract, whether expressed or implied, to pay anything beyond that sum, under any name whatever, for or in respect of the occupation of the land, could not be enforced," and he emphasizes the point by declaring at page 740 that the judgment of the Privy Council decided "that nothing can be recovered from the tenant except the one sum fixed as the rent of the land."

On the other hand, Ghose J., at page 767, interpreted the decision of the Privy Council as follows :—

"I do not understand that they intended to go any way beyond what Mr. Justice Mitter said in his judgment, and to lay down, as it is said they did lay down, that nothing, save and except *one* sum, including every item of payment, could be recovered as payable for the occupation of land; and that an agreement to pay anything beyond *that* sum, although it might be a lawful consideration for the lease, could not be enforced. It appears to me that if in any given case the Court finds that any particular sum specified in the lease, or agreed to be paid, is a lawful consideration for the use and occupation of any land, that is to say, if it is really part of the rent, although not described as such, it would be justified in holding that it is not *abwab*, and is recoverable by the landlord."

It is to be noticed that the interpretation placed upon the Privy Council's judgment by Petheram C.J. has not been followed in this Court, as for instance, *Kumar Kalanand Singh* v. *Eastern Mortgage Agency Ld. Co.*(1). In that case it was agreed that the lessee should pay a fixed sum of Rs. 4,310 of which Rs. 4,300 was described as *jama*, Rs. 5 as *salami towji*, and Rs. 5 as *tehwari dasahra*.

(1) (1913) 18 C. L. J. 83.

1917

BIJOY SINGHA DUDHURIA v. KRISHNA BEHARI BISWAS.

SANDERSON C. J.

It is to be noticed that the sum fixed for rent was Rs. 4,300 and the other two sums could not be called rent in the strict sense, yet it was held that they could be recovered on the ground that the payment of the specific sums was provided for and agreed upon in the lease creating the tenancy, and that the stipulation for such payment was not a stipulation or reservation for the payment of arbitrary or indefinite cesses but were in the language of section 3 of Regulation V of 1812 a definite clause in the engagement contracted between the parties which should be maintained and given effect to: and that in fact the two sums then in question, though not described in the lease as rent, were in reality part of the consideration for which the tenancy was created, and part of the rent agreed to be paid [see the judgment in that case at page 85].

There are other cases in which the interpretation given by Petheram C.J. to the decision of the Privy Council in *Radha Prosad Singh* v. *Bal Kowar Koeri* (1) has not been followed, e.g., *Assanulla Khan Bahadur* v. *Tirthabashini* (2), *Mathura Prasad* v. *Tota Singh* (3) and *Upendra Lal Gupta* v. *Meheraj Bibi* (4). In the first of these cases it was argued by the vakil for the respondents that the mere fact of the amount claimed on account of *Chowkidari* tax not being consolidated with what was called the *Patni* rent, but being kept separate, was enough to render it an *abwab* and therefore not recoverable, and *Tilukdari Singh* v. *Chulhan Mahton* (5) and *Radha Prasad Singh* v. *Bal Kowar Koeri* (1) were cited as authorities for the proposition. The learned Judges,

(1) (1890) I. L. R. 17 Calc. 726, 739.
(2) (1895) I. L. R 22 Calc. 680, 688.
(3) (1912) I. L. R. 40 Calc. 806 ; 16 C. L. J. 296.
(4) (1916) 21 C. W. N. 108.
(5) (1889) I. L. R. 17 Calc. 131.

however, though they said that there were passages in some of the judgments delivered in these cases, which, taken alone, might appear to lend support to the respondents' contention, did not adopt the argument.

It seems, therefore, that the rule which has been followed in this Court is, that each case must depend upon the proper construction of the contract before the Court, and if upon a fair interpretation of the contract it can be seen that a particular sum is specified in the contract, or agreed to be paid as the lawful consideration for the use and occupation of the land, *i.e.*, if it is really part of the rent, although not described as such, the landlord can recover it; and I apply this rule to the present case. It is necessary, therefore, to consider the nature of the payment which is in question.

It is a yearly payment for the *Isswar Thakur* at the lessor's house at Azimganj and the nature of it is shown by the fact that the plaintiff, who is the assignee of the lessor, has nothing to do with the *Thakur* at Azimganj and does not maintain it in any way.

Further, the clause relating to the payment of the sum of Rs. 15 and to its recovery is couched in terms which lead me to think that this payment cannot have been intended by the parties to be part of the rent or to be payable in respect of the use and occupation of the land: in addition to this there is the absence of any reference to this sum in the details of the instalments at the end of the document, and on the true construction of the terms of the lease I have come to the conclusion that this sum of Rs. 15 was not intended by the parties to be part of the consideration for the use and occupation of the land or as part of the rent and, therefore, is not recoverable. Consequently,

1917

BIJOY SINGHA DUDHURIA v. KRISHNA BEHARI BISWAS.

CHATTERJEA J.

in my judgment, this appeal should be dismissed with costs.

N. R. CHATTERJEA J. The question involved in this appeal is whether a sum of Rs. 15, which was agreed upon to be paid by a permanent tenure-holder under a *kabuliat* as the '*mamuli* for the *Isswar Thakur* at the house, of the zemindar is or is not an *abwab*. The *kabuliat* was in respect of a *patni* tenure and was executed in the year 1882. The rent of the *patni* was fixed at Rs. 3,315-4. In a subsequent clause it was stipulated " Besides this, I shall continue to pay in the month of *Bhadra* for every year the sum of Rs. 15 as the *mamuli* for the *Isswar Thakur* at your house at Azimganj. " In the details of instalments the total rent was stated to be Rs. 3315-4-0 which was distributed into 12 monthly instalments specified in the lease, and did not include the said sum of Rs. 15 which was made payable only once, in the month of *Bhadra* every year. The sum of Rs. 3,315-4 is referred to throughout the *kabuliat* as the rent, and the Rs. 15 as already stated, was neither described nor treated as part of the rent in any part of the *kabuliat*. Then it was provided that if the *patnidar* failed to pay the said sum of Rs. 15 amicably the zemindar would be entitled to deduct the said amount from the money which might be remitted by the *patnidar* as *the rent*, or realise the amount along with the arrears of rent, or separately by instituting suits, thus clearly distinguishing the said sum of Rs. 15 from the rent. These provisions would have been wholly unnecessary, had the sum of Rs. 15 been part of the rent. There is no doubt, therefore, that the sum of Rs. 15 did not form part of the rent, nor was it treated as part of the rent.

It is contended on behalf of the appellant that the said sum of Rs. 15 formed part of the consideration for the *patni* lease and is therefore recoverable. But in the first place I do not think the said sum is part of the consideration for the *patni*. The sum was agreed to be paid as a customary present to the deity at the house of the then zemindar, Dhanpat Singh. The plaintiff is an assignee of Dhanpat and he has nothing to do with the *Thakur* at Azimgunj which is maintained by the sons of Dhanpat the original lessor. The "*mamuli* for the *Isswar Thakur*," I think, cannot be claimed by the plaintiff as it was not money payable on account of the use and occupation of the land. In the next place, even assuming that it did form part of the consideration for the use and occupation of the land, I am of opinion that it cannot be recovered as it did not form part of the rent.

It is contended on behalf of the appellant that if a specific sum which is neither uncertain nor indefinite is agreed upon to be paid in the lease creating the tenancy as part of the consideration for the use and occupation of the land, the stipulation to pay such a sum is not void and must be given effect to, and reliance is placed on the provision of section 3 of Regulation V of 1812 (which is the law applicable to the present case) and certain decisions of this Court. Now, section 3 of that Regulation runs as follows :—"Such parts of Regulation VIII of 1793 and of Regulation IV of 1794 as require that the proprietors of land shall prepare forms of *pottahs*, and that such forms shall be revised by the Collectors, and which declare that engagements for rent contracted in any other mode than that prescribed by the Regulation in question, shall be deemed to be invalid, are hereby rescinded: and the proprietors of land shall henceforward be considered competent to grant leases to their dependant

1917

BIJOY SINGHA DUDHURIA v. KRISHNA BEHARI BISWAS.

CHATTERJEA J.

talookdars, under-farmers and *raiyats* and to receive corresponding engagements for the payment of rent from each of those classes, or any other classes of tenants, according to such form as the contracting parties may deem most convenient and most conducive to their respective interests. Provided, however, that nothing herein contained shall be construed to sanction, or legalize the imposition of arbitrary or indefinite cesses, whether under the denomination of *abwab*, *mathote*, or any other denomination. All stipulations, or reservations of that nature shall be adjudged by the Courts of Judicature to be null and void: but the Courts shall notwithstanding maintain and give effect to the definite clauses of the engagements contracted between the parties, or, in other words, enforce payment of such sums as may have been specifically agreed upon between them." It will be seen that the section clearly prohibits the imposition of arbitrary or indefinite cesses "whether under the denomination of *abwab*, *mathote* or any other denomination." It is true that the concluding portion of the section says: "The Court shall notwithstanding maintain and give effect to the definite clauses of the engagements contracted between the parties, or, in other words, enforce payment of such sums as may have been specifically agreed upon between them." But I think that does not mean that the Court is to enforce payment of every sum which is not indefinite and which may have been specifically agreed upon between the parties. If that is the meaning of the section, a stipulation to pay a fixed sum (in addition to the rent) expressly described as *abwab* or *mathote* if specifically agreed upon in the contract creating the tenancy must be enforced. It may be said that an *abwab* or *mathote* is an arbitrary cess and is expressly prohibited by the section, and, therefore,

1917

BIJOY SINGHA DUDHURIA v. KRISHNA BEHARI BISWAS.

CHATTERJEA J.

cannot be recovered even if specifically agreed upon. But the section prohibits the imposition of cesses not only under the denominations of *abwab* or *mathote*, but of 'any arbitrary or indefinite cess' under 'any other denomination.'

The concluding portion of section 3 of Regulation V of 1812 came up for consideration before the Full Bench in the case of *Chulhan Mahton* v. *Tilukdari Singh* (1), and Mitter J. (Tottenham and Pigott JJ. concurring with him) referring to the last four lines of the section observed at p. 184 of the report:—"This provision, it seems to me, refers only to the amount which is by the contract fixed as the rent payable to the landlord. The section in question provides mainly that the proprietors of land shall thenceforth be competent to grant leases to ryots etc., to receive corresponding engagements *for the payment of rent from them.* Having regard to the words of the section in question, I think the words 'sum specified' refer to the amount of the rent specified." It is true the question referred to the Full Bench was whether certain items over and above the rent described in the zemindari papers and in the plaint as *abwabs* were legally recoverable. One of the arguments, however, before the Court was that, as there was a 'contract' between the parties for the payment of the sums claimed in that case, under the latter portion of section 3 of Regulation V of 1812 the plaintiffs were entitled to recover them. So that the construction of that section came up for consideration before the Full Bench. On appeal, the Judicial Committee, no doubt, affirmed the decision in that case upon a consideration of the provisions of sections 54 and 55 of Regulation VIII of 1793 and held that if the *abwabs* claimed, existed at the time of the

(1) (1885) I. L. R. 11 Calc. 175.

1917

BIJOY SINGHA DUDHURIA v. KRISHNA BEHARI BISWAS.

CHATTERJEA J.

Permanent Settlement, they ought to have been consolidated with the rent under section 54 of that Regulation, and if they were not payable at that time, they would come under the descriptions of new *abwabs* under section 55, and, therefore, could not be recovered. But their Lordships did not disapprove of the view taken by the Full Bench as to the construction to be placed on section 3 of Regulation V of 1812.

A similar view was taken by the Full Bench in the case of *Radha Prosad Singh* v. *Bal Kowar Koeri* (1). The question in that case was whether certain cesses under the denomination of *sarak*, *nej* and *khuruch* which had been paid for a long time along with the rent and without specification in the rent receipts were recoverable. They were not agreed upon to be paid by any written engagement at the creation of the tenancy or as part of the rent, and appear to have been subsequent impositions. But the correctness of the decision in *Pudmanund Singh Bahadur* v. *Baij Nath Singh* (2) having been questioned in the order of reference, the provisions of section 3 of Regulation V of 1812, were considered by the Full Bench in dealing with the question of *abwabs*, and the opinion of the learned Judges is certainly entitled to great weight. O'Kinealy J. (Prinsep and Pigot JJ. agreeing with him) observed at page 752: "By section 2 of Regulation XVIII of 1812, the proprietors were empowered to grant leases of any form of rent, and by section 3 of Regulation V of 1812 they were empowered to receive from the tenants 'corresponding engagements for the payment of rent,' and it only. No further power was given. And as if to make the distinction between cesses and rent, the former are referred to as paid under stipulations or reservations, the latter under

(1) (1890) I. L. R. 17 Calc. 726. (2) (1888) I. L. R. 15 Calc. 828.

engagements, and it was the engagements for the payment of rent, and not the stipulations for cesses, that were to be enforced. It was not the intention of the framers of this Regulation to allow the parties to contract for anything in money or in kind not then known as rent, and when they describe *abwabs* and *mathotes* as arbitrary or indefinite they were only using words applied to these assessments from 1772. Bearing this in mind, a comparison of the latter portion of this section with sections 54 and 57 of Regulation VIII of 1793 shows that the words 'specifically agreed' in Regulation V of 1812 are the same as 'specifically stated' in section 57, and refer to the *one* specific sum of section 54 in the Permanent Settlement. They have no reference to cesses. This is the view taken by the Full Bench in *Chulhan Mahton's* case (1), where it is said that the last four lines of section 3 of Regulation V of 1812 refer to the ground rent in the Permanent Settlement."

We have been referred to certain observations of Banerjee, J. in the case of *Assanulla Khan* v. *Tirthabashini* (2) in support of the appellant's contention. The amount objected to in that case was *chowkidari* cess which the *patnidar* agreed to pay to the zemindar. The agreement to pay *chowkidari* tax by a *patnidar*, as pointed out in that case, could not possibly be considered as a stipulation to pay an arbitrary or indefinite cess in the nature of an *abwab* within the meaning of section 3 of the Regulation. It is true, Banerjee J., (in referring to the fact that the majority of the learned Judges in the Full Bench case of *Radha Prosad Singh* (3) took the same view of Regulation V of 1812 as was taken by the Full Bench in *Chulhan Mahton's* case) observed that the "majority of the Full Bench in the former case based their

(1) (1885) I. L. R. 11 Calc. 175. (2) (1895) I. L. R. 22 Calc. 680.
(3) (1890) I. L. R. 17 Calc. 726.

1917

BIJOY SINGHA DUDHURIA v. KRISHNA BEHARI BISWAS.

CHATTERJEA J.

conclusion that *Pudmanund's* case (1) was wrongly decided, not upon the ground that the items there claimed and allowed, were kept separate from the amount styled the rent and were therefore, not recoverable, but upon the ground that they were from their very nature no part of the ground-rent the items being *salami* and *tehwari*." But that involves a distinction between rent and cesses; and Banerjee J. himself in the case of *Sreekanta Pershad Hajari* v. *Irshad Ali Sarkar* (2) disallowed the "price of presents and unpaid labour" in addition to the rent stipulated for in the *kabuliat* on the ground, among others, that they were dealt with separately from the actual rent in the *kabuliat*.

The construction of section 3 of Regulation V of 1812 now put forward on behalf of the appellant was distinctly set up in the case of *Pudmanund Singh Bahadur* v. *Baij Nath Singh* (1). That was also a case of a permanent tenure and the tenant agreed to pay a certain fixed sum as rent and also certain other items designated *salami* and *tehwari* in the contract creating the tenancy. Tottenham and Ghose JJ. held that they were not illegal cesses within the Full Bench Ruling of *Chulhan Mahton* v. *Tilukdari Singh* (3) not being uncertain and arbitrary in their character, but specific sums which the tenants agreed to pay to the landlords and the payment of which no less than the payment of rent itself, formed part of the consideration upon which the tenancy was created, and which were in fact part of the rent agreed to be paid although not so described; they were recoverable therefore under Regulation V of 1812. In the Full Bench case of *Radha Prosad Singh* v. *Bal Kowar Koeri* (4), however, Ghose J., although he

(1) (1888) I. L. R. 15 Calc. 828.
(2) (1894) 16 C. L. J. 225.
(3) (1885) I. L. R. 11 Calc. 175.
(4) (1890) I. L. R. 17 Calc. 726.

repeated the same observations, said at page 768 with reference to the opinion expressed in *Pudmanund's Case* (1) as follows :—"And I may here observe that it was not intended thereby to hold that anything that is not arbitrary and indefinite is recoverable, although it may not be part of the *rent*. In that case, both the elements were supposed to be present, *viz.*, that the items in question were not of an arbitrary or indefinite character; and, secondly, they formed part of the rent agreed to be paid. I am, however, bound to say that having since more carefully considered the subject, I have come to the opinion that we were not right in holding that the items of *tehwari* and *salami* were part of the rent stipulated to be paid under the lease. They were, I now think, *abwabs*." So that according to the opinion of the Judges in the two Full Bench cases (in-cluding Ghose J. himself) it is only the rent, and not any other item, though neither indefinite nor arbitrary, and though agreed upon to be paid in the written engagement, which can be recovered under the Regulation, and the contrary view taken in *Pudmanund Singh's Case* (1) was dissented from.

The question, therefore, is what is the rent which is recoverable under the Regulations? Is it the single item which may be called the rent proper, or does it include any other item which is consolidated with it and agreed upon by the parties as the 'rent'? In *Radha Prosad's Case* (2) Petheram C. J. was of opinion that the Judicial Committee in *Chultan Mahton's Case* (3), while affirming the judgment of the High Court, went beyond it and held that, "under the Regulation nothing could be recovered except one sum which must include everything which was

(1) (1888) I. L. R. 15 Calc. 828. (2) (1890) I. L. R. 17 Calc. 726.
(3) (1885) I. L. R. 11 Calc. 175.

1917

BIJOY SINGHA DUDHURIA v. KRISHNA BEHARI BISWAS.

CHATTERJEA J.

payable for such occupation arrived at either by agreement or by some judicial determination between the parties, and that any contract, whether expressed or implied to pay anything beyond that sum, under any name whatever, for or in respect of the occupation of the land, could not be enforced." O'Kinealy J. also (as stated above) observed with the concurrence of two other Judges that it is only one specific sum, being the "ground-rent" of the Permanent Settlement which can be recovered. The view, however, that nothing beyond "one sum" can be recovered has not been followed in the subsequent cases unless the expression "one sum" was meant to include a consolidated sum agreed upon as "the rent" though consisting of more items than one. In all the subsequent cases the distinction which has been drawn is that between the sum agreed upon as "the rent" (*i.e.*, the amount which is fixed by the contract as the rent) and sums not so agreed upon and the decisions proceed upon the view that more items than one may constitute the *rent* if it appears from the lease that more items than one have been treated by the parties as part of and included in the "rent" and described as such in the lease. It is unnecessary to go into all these cases in detail. Where a lease provides for payment of a fixed sum as rent and also provides for the payment of certain other fixed sum *apart from the rent* (for instance as the price of certain articles) such amount has been held to be an *abwab* though stipulated to be paid by the written contract creating the tenancy and though the amount payable is not indefinite; and in determining whether such item did or did not form part of the rent, the fact that it has been stipulated to be paid separately from the rent, and also the fact that it is not included in the instalments of the rent have been considered as having material bearing on the

question. For instance in the case of *Radha Charan Ray Chowdhury* v. *Golak Chandra Ghose* (1) a fixed amount mentioned in a lease as payable annually for collection charges, which together with the rent was described as the *jama* and which was included in the *kistbandi*, the total being referred to as the rent, was held not to be an *abwab*. On the other hand, a certain sum stipulated to be paid for *Iswar Puja* [*Narendra Kumar Ghose* v. *Gora Chand Poddar* (2)] or as *holi salami* [*Bepin Behary Mitter* v. *Prokash Chandra Sarkar* (3)] or as the price of presents and unpaid labour [*Sree Kanta Prashad Hajari* v. *Irshad Ali Sarkar* (4)] or as price of husk [*Mathura Prosad* v. *Tota Singh* (5) and *Kalar Singh* v. *Mathura Prosad* (6)] where the sum was treated in the *kabuliat* separately from the rent or was not included in the *kistbandi*, was held to be an *abwab*. In all these cases, there was a written engagement at the creation of the tenancy, and there was express stipulation to pay a specific sum of money which was not uncertain or indefinite and yet it was held that the sum did not form part of the rent but was an *abwab*, and could not be recovered. Some of these cases relate to *ryati* holdings and not to permanent tenures. But so far as the question whether the additional sum claimed under the *kabuliat* was or was not an *abwab*, is concerned, there is no difference between a *ryati* holding and a permanent tenure.

The latest cases on the point are *Kumar Kalanand Singh* v. *Eastern Mortgage Agency, Ltd., Co.* (7), and *Upendra Lal Gupta* v. *Meheraj Bibi* (8). In the first

(1) (1904) I. L. R. 31 Calc. 834.
(2) (1906) I. L. R. 33 Calc. 683.
(3) (1910) 13 C. L. J. 148.
(4) (1894) 16 C. L. J. 225.
(5) (1912) I. L. R. 40 Calc. 806; 16 C. L. J. 296.
(6) (1913) 19 C. L. J. 402.
(7) (1913) 18 C. L. J. 83.
(8) (1916) 21 C. W. N. 108.

1917

BIJOY SINGHA DUDHURIA v. KRISHNA BEHARI BISWAS.

CHATTERJEA J

case a permanent tenure was created by a lease dated 31st January, 1874, and in the lease it was specifically provided that the lessee should pay to the lessor year by year a fixed sum of Rs. 4,310, of which the sum of Rs. 4,300 was described as *jama* and Rs. 10 as *salami* and *tehwari*. Chitty and Teunon JJ. held that they were not *abwabs* as they were specific sums provided and agreed upon in the lease creating the tenancy, and such stipulation was not for the payment of arbitrary or indefinite cesses but in the language of section 3 of Regulation V of 1812 is "a definite clause in the engagement contracted between the parties," which should be "maintained and given effect to." The learned Judges were of opinion that the two sums in question though not described in the lease as rent were in reality part of the consideration for which the tenancy was created and *part of the rent* agreed to be paid. In *Upendra Lal Gupta* v. *Meheraj Bibi* (1), a sum of Rs. 3-1-0 described as "enhanced rent" for collection charges together with the rent proper was fixed as the total rent, the details of the *kistbandi* dealt with the whole amount including the said sum of Rs. 3-1 and the total amount was throughout referred to as the rent. It was under these circumstances that the amount was held to be part of the rent and not an *abwab* in accordance with the view taken in the previous decisions on the point since *Radha Prosad's Case* (2). The case of *Kumar Kalanand* (3) was referred to in the judgment (to which I was a party) as the learned Judges in that case had held upon a construction of the *kabuliat* (the terms of which were not fully set out in the report) that the two items were "part of the rent" agreed upon to be paid. If, however, the learned

(1) (1916) 21 C. W. N. 108. (2) (1890) I. L. R. 17 Calc., 726.
(3) (1913) 18 C. L. J. 83.

Judges took the same view, as had been taken by Tottenham and Ghose JJ., in *Pudmanund's Case* (1) (in which the very same items *salami* and *tehuari* were in dispute) it is opposed to the view taken not only by the majority of the Full Bench (and in a manner by Ghose J., himself as stated above) in *Radha Prosad's Case* (2), and in *Chulhan Mahton's Case* (3), but in all the cases decided subsequently.

The actual decision in *Upendra Lal's Case* (4), proceeded upon the ground that the sum objected to was part of the rent. The expression "consideration for the lease" used in the judgment were qualified by the words "and part of the rent," and these words were repeated more than once in our judgment. It was not meant that any consideration for the lease mentioned in the *kabuliat* creating the tenancy is rent and not an *abwab*. Any sum agreed upon to be paid as 'rent' is consideration for a lease, but for the purpose of deciding the present question every consideration for a lease is not necessarily 'rent' within the meaning of section 3 of the Regulation, and anything which is prohibited by statute cannot be said to be lawfully payable. In fact the distinction between what upon a construction of a lease is rent and a sum not treated nor described as rent but which may have been agreed upon to be paid by the *kabuliat* was recognised in that judgment, as the reference to the several cases cited show [though the fact that such a distinction was not observed by Garth C. J. in *Mahomed Fayez Chowdhry* v. *Jamoo Gazee* (5) was overlooked in citing that case] and the judgment was in fact founded upon that distinction, though not clearly expressed. The observation that since the

(1) (1888) I. L. R. 15 Calc. 828.
(2) (1890) I. L. R. 17 Calc. 726.
(3) (1885) I. L. R. 11 Calc. 175.
(4) (1916) 21 C. W. N. 108.
(5) (1882) I. L. R. 8 Calc. 730.

1917

BIJOY SINGHA DUDHURIA v. KRISHNA BEHARI BISWAS.

CHATTERJEA J.

Full Bench decision, the question has been treated as one of construction, "although more items than one are described as constituting the rent," was made with reference to the view taken by some of the Judges in *Radha Prosad's Case* (1) that only one sum is rent and the rest are *abwabs*. What was meant to be said was that if the item other than the rent proper is consolidated with it and appears from a construction of the lease to have been included in and treated as part of the rent, so that the two items constitute the 'rent' agreed upon at the creation of the tenancy, then the mere fact that there are two items would not make the item other than the rent proper an *abwab*.

It is contended that the mere fact that a certain item is dealt with in the *kabuliat* in a separate clause or that it is not included in the instalments of rent ought not to make any difference in determining whether the item is or is not rent. But those facts have an important bearing upon the question of intention of the parties to the contract. They show whether the parties intended to treat a particular item as part of the rent agreed upon to be paid or as something different from the rent, and those facts have accordingly been taken into consideration in all the cases decided since the Full Bench.

The question whether a particular item is or is not rent, no doubt depends upon the construction of the lease in each case. But once it is held that a particular item has not been agreed upon by the parties as the 'rent' nor described in the lease as such, the further question whether such sum, although it may form part of the consideration mentioned in the contract, is recoverable or not must depend upon the law as laid down in the Regulations and Acts on the point. So far as the construction of the lease in the

(1) (1890) I. L. R. 17 Calc. 726.

present case is concerned, the sum of Rs. 15 as *Thakurbari Mamuli* is not, for the reasons already stated, part of the rent. The sum, therefore, cannot be recovered, having regard to the provisions of Regulation V of 1812, and the cases decided on the point. I, accordingly, agree in dismissing the appeal.

1917

BIJOY SINGHA DUDHURIA *v.* KRISHNA BEHARI BISWAS.

O. M. *Appeal dismissed.*

LETTERS PATENT APPEAL.

Before Mookerjee and Beachcroft JJ.

KAILASH CHANDRA DATTA

v.

PADMAKISORE ROY.*

1917

April 23.

Custom or Usage—Facts proving existence of custom or usage whether questions of law—Actual proof thereof question of fact—Second Appeal.

The question whether the facts found in any given instance prove the existence of the essential attributes of a custom or usage is a question of law which may be discussed in second appeal ; the question whether such a state of facts has been proved by the evidence is merely a question of fact.

Kakarla Abbayya v. *Raja Venkata Papayya Rao* (1) dissented from.

APPEAL by Kailash Chandra Datta and others, the defendants, from the judgment of D. Chatterjee, J.

The facts necessary for the purposes of this report are shortly these. In the two suits out of which these appeals arose the plaintiffs sued for the recovery of possession of certain disputed lands transferred to the defendants by the tenants.

* Letters Patent Appeals Nos. 100 and 101 of 1914, in Appeals from Appellate Decrees Nos. 4155 and 4156 of 1910.

(1) (1905) I. L. R. 29 Mad. 24.

1917

KAILASH CHANDRA DATTA v. PADMA-KISORE ROY.

They pleaded that the lands in question constituted non-transferable occupancy holdings which could not be so transferred without the consent of the landlord and prayed for the ejectment of the defendant as trespassers. The defendants on the other hand relied upon the existence of a custom or local usage whereby they submitted the holdings were transferable without the landlord's consent. On the 29th June 1909, the Court of first instance decreed the suits holding that "the essence of a custom of transferability is that the transfer made to the knowledge of, but without the consent of, the landlord is valid and must be recognised by the landlord. The evidence on the record is quite insufficient to recognise the test." On appeal, the lower Appellate Court, on the 23rd July 1910, dismissed the appeals and confirmed the findings of the Court of first instance. The defendants, thereupon, preferred second appeals to the High Court. On the 17th July 1914, D. Chatterjee J. dismissed the appeals holding that "the appeals were concluded by the findings of facts arrived at by the lower Appellate Court." The defendants now preferred appeals under clause 15 of the Letters Patent.

Dr. Jadu Nath Kanjilal (with him *Babu Birendra Chandra Das*), for the appellants, relied upon section 100 (*a*) and (*b*) of the Code of Civil Procedure, 1908, where the words "Some usage having the force of law" occurred. The question as to the existence or otherwise of a local custom or usage having the force of law was not a mere question of fact, but a mixed one of law and fact. It was one thing to say that in proving a particular custom certain facts are found, but it was quite a different thing when the question arose whether the facts so found did or did not establish a custom or usage having the force of law. In

the present case, the facts were quite sufficient to establish the custom hence it would be necessary to go into the evidence: *Eranjoli* v. *Eranjoli* (1), *Kakarla Abbayya* v. *Raja Venkata Papayya Rao* (2).

Babu Upendra Kumar Roy, for the respondents, was not called upon.

Cur. adv. vult.

MOOKERJEE J. These appeals have been preferred, under clause 15 of the Letters Patent, against the judgments of Mr. Justice Digambar Chatterjee in two suits for recovery of possession of land. The plaintiffs alleged that the lands in dispute constituted non-transferable occupancy holdings and yet the tenants had transferred them to the defendants. The plaintiffs consequently prayed that the defendants might be ejected as trespassers. The defendants contended that the holdings were transferable by custom and local usage. Thereupon, an issue was raised in these terms: "whether rayati lands are transferable by usage and custom without the consent of the landlord." The Court of first instance ruled, on the authority of the decision in *Peary Mohan Mukerjee* v. *Jote Kumar Mukerjee* (3), that to prove a custom or usage that occupancy holdings are transferable in any locality, it is not sufficient to show simply that such holdings are sold in the village or neighbouring villages, as the essence of usage or transferability is that transfers made to the knowledge of, but without the consent of, the landlord are valid and must be recognised by him. The Court examined the evidence from this point of view and came to the conclusion that it was quite insufficient to establish the alleged custom or usage. The Court held expressly that the evidence showed

(1) (1883) I. L. R. 7 Mad. 3. (2) (1905) I. L. R. 29 Mad. 24.
(3) (1906) 11 C. W. N. 83.

1917

KAILASH CHANDRA DATTA v. PADMA-KISORE ROY.

MOOKERJEE J.

that the names of the transferees were not recorded in the office of the landlord unless a bonus was paid, and that even when bonus was offered by the transferees to the landlord, the latter had the option either to accept or refuse the same. In this view, the Court decreed the suits. Upon appeal by the defendants, the Subordinate Judge confirmed the findings of the trial Court and held that the evidence did not go to show that occupancy holdings were transferable by custom or usage. With reference to instances of transfer adduced by the defendants, the Subordinate Judge observed that, as ruled in the case of *Rajendra Kishore Adhikari* v. *Chandra Nath Dutt* (1), a growing usage of transferability was of no effect against the landlord and that the usage to be effective must have already grown up: *Bazlul Karim* v. *Satis Chandra Giri* (2). In this view, the Subordinate Judge dismissed the appeals. On second appeal to this Court, Mr. Justice Digambar Chatterjee has held that the appeals were concluded by the findings of fact arrived at by the lower Appellate Court. On the present appeals, Dr. Jadu Nath Kanjilal has argued that the evidence on the record is sufficient to establish the existence of the alleged custom or usage of transferability, and he has invited us to read the whole of the evidence on the record. In support of the course we have been asked to adopt, reference has been made to the decisions in *Eranjoli* v. *Eranjoli* (3) and *Kakarla Abbayya* v. *Raja Venkata Papayya Rao* (4).

We have the authority of the Judicial Committee for the proposition that a decision that an alleged custom is not established by the evidence on the record is a decision on a question of fact. In the case of

(1) (1907) 12 C. W. N. 878.
(2) (1911) 13 C. L. J. 418; 15 C. W. N. 752.
(3) (1883) I. L. R. 7 Mad. 3.
(4) (1905) I. L. R. 29 Mad. 14.

Muhammad Kamil v. *Imtiaz Fatima* (1), the plaintiff contended that the rights of the parties were regulated by the Mahomedan Law of Inheritance; the defendants set up a family custom whereby female heirs were excluded. The trial Court held that the alleged custom was not established by the evidence, and this conclusion was confirmed by the Judicial Commissioner on appeal. Sir Arthur Wilson observed that the existence of the custom was a question of fact, and as the Courts in India had concurred in their judgment as to this question, their Lordships saw no reason why they should not follow their usual practice of accepting concurrent findings of fact. Precisely the same language was used by Lord Collins in another case decided by the Judicial Committee: *Anant Singh* v. *Durga Singh* (2). There the question arose whether succession in a Hindu family was regulated by a special family custom or by the ordinary Mitakshara Law. The Judicial Commissioners, disagreeing with the trial Court, held that the evidence adduced by the plaintiff was not sufficient to establish the special custom. The Judicial Committee held that the question involved was one of fact only, and they saw no reason whatever to differ from the opinion of the Judicial Commissioners. The view that the question as to the existence of a custom is a question of fact, is supported by numerous decisions of high authority in the English Courts. Thus, in *Nelson* v. *Dahl* (3), Sir George Jessel M.R., observed that the question whether there was a specified custom or usage in the Balticwood trade was a question of fact and like all other customs it must be strictly proved. In *William Postlethwaite* v. *John Freeland* (4), Lord Blackburn

(1) (1909) I. L. R. 31 All. 557.
(2) (1910) I. L. R. 32 All. 363; L. R. 37 I. A. 191.
(3) (1879) 12 Ch. D. 568, 575.
(4) (1880) 5 App. Cas. 599, 616.

1917

KAILASH CHANDRA DATTA v. PADMA-KISORE ROY.

MOOKERJEE J.

held that the question whether an alleged custom of the port was established by the evidence was rightly left to the Jury. To the same effect is the decision in *Goodwin* v. *Robarts* (1). Similarly, Channell J. observed in *Moult* v. *Halliday* (2), that the question as to the existence of a custom is a question of fact, and it is necessary to prove the custom in each case, until eventually it becomes so well-understood that the Courts take judicial notice of it. A similar view has prevailed in this Court for at least half a century. Thus, in *Hureehur Mookarjee* v. *Jadunath Ghose* (3). Jackson J. held that the question whether the disputed tenure was transferable by custom, was a question of fact on which the lower Court alone could pass a decision and on which the High Court could not interfere on second appeal. To the same effect is the judgment of Glover J. in *Joykishen Mookerjee* v. *Doorga Narain Nag* (4). Again Kemp J. observed in *Syed Ali* v. *Gopal Dass* (5), that a finding upon a question of custom after going into evidence was a finding on a question of fact with which the High Court could not interfere in second appeal. Precisely the same view was taken by Farran C. J. in *Bai Shirinbai* v. *Kharshedji* (6), where he ruled that sitting in second appeal, it was not open to the Court to arrive at an independent finding as to whether the evidence established, as the Courts below concurrently held it did, the existence of a custom amongst Parsis which validated and rendered binding marriages contracted between children of tender age.

But, although the question of the existence of an alleged custom is a question of fact, it is conceivable that the decision may involve an error of law so as to justify the interference of the High Court in second

(1) (1875) L. R. 10 Ex. 337.
(2) [1898] 1 Q. B. 125, 129.
(3) (1868) 10 W. R. 153.
(4) (1869) 11 W. R 348.
(5) (1870) 13 W. R. 420.
(6) (1896) I. L. R. 22 Bom. 430, 437.

appeal. Thus, the decision is liable to attack in second appeal on the ground that irrelevent evidence has been received, as in *Palakdhari Rai* v. *Manners* (1) and *Durga Charan* v. *Raghunath* (2) or, that relevant evidence has been excluded, as in *Dalglish* v. *Guzuffer Hassain* (3) and *Sariatullah* v. *Pran Nath* (4). The decision may also be successfully attacked on the ground that there is no evidence of the alleged custom, or, as it is sometimes said, that the finding as to the existence of the custom is based on legally insufficient evidence : *Peary Mohan* v. *Jote Kumar*(5), *Hashim* v. *Abdul* (6) *Ram Bilash* v. *Lal Bahadur* (7). The decision may, again, be assailed on the ground that the facts found do not constitute evidence of the alleged custom : *Durga Charan* v. *Raghunath* (2), *Hanumantamma* v. *Rami Reddi* (8), *Mirabivi* v. *Vellayanna* (9), *Subhadra* v. *Tribhuban* (10). The decision may, further, be liable to attack on the ground that in the determination of the question in controversy, legal principles or tests have been erroneously applied, for instance, that the Court has not correctly appreciated the essential attributes of a custom [*Mahamaya* v. *Haridas* (11), *Desai* v. *Rawal* (12), *Prodyot* v. *Gopi*(13)] or of a usage [*Dalglish* v. *Guzuffer* (3), *Palakdhari* v. *Manners* (1)] or, has overlooked the distinction between a custom and a usage [*Nelson* v. *Dahl* (14)]. Consequently, the question, whether the facts found in any given instance prove the existence of the essential attributes of a custom or usage is a

(1) (1895) I. L. R. 23 Calc. 179.
(2) (1913) 18 C. W. N. 55.
(3) (1896) I. L. R. 23 Calc. 427.
(4) (1898) I. L. R. 26 Calc. 184
(5) (1906) 11 C. W. N. 83.
(6) (1906) I. L. R. 28 All. 698.
(7) (1908) I. L. R. 30 All. 311.
(8) (1881) I. L. R. 4 Mad. 272.
(9) (1885) I. L. R. 8 Mad. 464.
(10) (1912) 15 I. C. 247.
(11) (1914) I. L. R. 42 Calc. 455, 471.
(12) (1895) I. L. R. 21 Bom. 110.
(13) (1909) 11 C. L. J. 209.
(14) (1879) 12 Ch. D. 568, 575.

1917

KAILASH CHANDRA DATTA v. PADMA-KISORE ROY.

MOOKERJEE J.

question of law, which may be discussed in second appeal. [*Durga Charan* v. *Raghunath* (1), *Lalman* v. *Nandalal* (2)]. Obviously, the question whether a custom is reasonable or valid, is a question of law: *Hurry Churn* v. *Nimai Chand* (3), *Gurai* v. *Kuarmoni* (4). Subject to these qualifications, it is plain that the mere question of sufficiency of the evidence adduced to establish a custom is not a ground of second appeal: *Kurani* v. *Sajoni Kant* (5), *Hashim* v. *Abdul* (6), *Girraj* v. *Hargobind* (7), *Makund* v. *Krishna* (8), *Ganesh* v. *Sukraj* (9), *Lalman* v. *Nandalal* (10), *Mahadeo* v. *Nabi Baksh* (11). We are not unmindful that a contrary view was adopted in the case of *Kakarla* v. *Raja Venkata* (12), in which it was ruled that it is the duty of the Court in second appeal, when a question of custom is raised, to examine, the evidence, not merely with a view to ascertain whether all the essential elements have been proved to exist, but also whether the evidence is credible. We respectfully dissent from this view, which, in our opinion, finds no support from section 100 (1) (*a*) (*b*) of the Civil Procedure Code of 1908. No doubt, a second appeal lies to the High Court on the ground that the decision is contrary to, or has failed to determine some material issue of, "usage having the force of law." But this does not entitle the High Court in second appeal to determine whether the evidence of the existence of the alleged usage is or is not credible, though the High Court is competent to determine, whether the usage, proved by evidence to

(1) (1913) 18 C. W. N. 55
(2) (1913) 17 Oudh Cas. 1.
(3) (1883) I. L. R. 10 Calc. 138.
(4) (1915) 19 C. W. N. 1188.
(5) (1908) 12 C. W. N. 539.
(6) (1906) I. L. R. 28 All. 698.
(7) (1909) I. L. R. 32 All 125.
(8) (1911) 9 I. C. 839.
(9) (1911) 14 I. C. 12.
(10) (1913) 20 I. C. 894.
(11) (1914) 25 I. C. 104.
(12) (1905) I. L. R 29 Mad. 24.

exist, does or does not possess the force of law. In so far as the contrary view was taken in the cases of *Ram Harak* v. *Issur* (1), *Shahbaz* v. *Rahiman* (2), *Kakarla* v. *Raja Venkata* (3), and possibly also to some extent in *Eranjoli* v. *Eranjoli* (4), we are not prepared to accept them as correct expositions of the law. The substance of the matter is that while the question whether a given state of facts establishes a binding custom or usage is a question of law, the question whether such a state of facts has been proved by the evidence is a question of fact.

In the case before us, no question of law obviously arises upon the facts found by the lower Appellate Court in concurrence with the Court of first instance, and we are clearly of opinion that Mr. Justice Digambar Chatterjee properly declined to examine the oral and documentary evidence with a view to determine whether the Subordinate Judge was correct in his conclusion as to its insufficiency to establish the alleged custom or usage. The appeals fail and must be dismissed with costs.

BEACHCROFT J. I agree.

L. R. *Appeals dismissed.*

(1) (1909) 3 I. C. 558.
(2) (1911) 11 I. C. 536.
(3) (1905) I.. L. R 29 Mad. 24.
(4) (1883) I. L. R. 7 Mad. 3.

LETTERS PATENT APPEAL.

Before Mookerjee and Beachcroft JJ.

1917

April 23.

SYEDUNNESSA KHATUN

v.

AMIRUDDI.*

Sale—Bengal Tenancy Act (VIII of 1885)—Sale of tenancy—Status of the decree-holder—Effect of the cessation of interest (partial or entire) of the landlord.

Where the decree-holder continued to be the sole landlord at the date of the application for execution of the decree and in his character as landlord decree-holder took the necessary steps for the sale of the under-tenure in conformity with the statutory provisions, the effect of the execution sale is to pass the under-tenure to the purchaser, even though the decree-holder has lost his interest as landlord before the actual sale.

Forbes v. *Maharaj Bahadur Singh* (1) distinguished.

Hem Chunder Bhunjo v. *Mon Mohini Dassi* (2), *Chhatrapat Singh* v. *Gopi Chand Bothra* (3), *Srimant Roy* v. *Mahadeo Mahata* (4), *Khetra Pal Singh* v. *Kritarthamoyi Dassi* (5), *Prafulla* v. *Nasibannessa* (6) referred to.

APPEAL by Syedunnessa Khatun, the plaintiff, against the judgment of Mullick J.

This was an appeal in a suit for recovery of possession of land on declaration of title. The plaintiff obtained a decree for rent against an under-tenure holder. She executed the decree and at the execution she purchased the defaulting under-tenure. When she sought to recover possession of the property through Court, the present defendants refused to give up possession to her on the ground that they were in possession as holders of a subordinate under-tenure

* Letters Patent Appeal, No. 137 of 1915, in Appeal from Appellate Decree No. 1666 of 1914.

(1) (1914) I. L. R. 41 Calc. 926.
(2) (1894) 3 C. W. N. 604.
(3) (1899) I. L. R. 26 Calc. 750.
(4) (1904) I L. R. 31 Calc. 550.
(5) (1906) I. L. R. 33 Calc. 566.
(6) (1916) 24 C. L. J. 331.

lawfully created by the defaulter. The plaintiff, then, served a notice upon the defendants in accordance with the provisions of section 167 of the Bengal Tenancy Act and finally instituted the present suit for ejectment of the defendants.

The defendants contended that inasmuch as the plaintiff had ceased to be the sole landlord, her half share of the interest as superior landlord having been sold in execution of a mortgage decree against her, the sale was not a sale under the Bengal Tenancy Act, but only a sale of the right, title, and interest of the judgment-debtor under the Code of Civil Procedure. The Court of first instance decreed the suit. On appeal, the Subordinate Judge affirmed the decree of the Court of first instance. On second appeal to this Court, Mr. Justice Mullick dismissed the suit. Hence this appeal under clause 15 of the Letters Patent.

Maulvi A. K. Fazl Huq and *Babu Kali Prasanna Piplai*, for the appellant.

Babu Abinash Chandra Guha, for the respondent.

Cur. adv. vult.

MOOKERJEE J. This is an appeal under clause 15 of the Letters Patent, from the judgment of Mr. Justice Mullick in a suit for recovery of possession of land on declaration of title. The case for the plaintiff is that, on the 19th February 1908, she obtained a decree for rent against an under-tenure-holder, that she executed the decree in accordance with the special procedure prescribed in Chapter XIV of the Bengal Tenancy Act, and that on the 15th February 1909, she purchased the defaulting under-tenure at the execution sale. When she proceeded to take possession of the property through Court on the 17th July 1909, the present defendants declined to deliver up possession to her on the allegation that they were in possession as holders

1917

SYEDUNNESSA KHATUN v. AMIRUDDI.

MOOKERJEE J.

of a subordinate under-tenure lawfully created by the defaulter. The plaintiff, thereupon, proceeded to annul the alleged incumbrance by service of notice in accordance with the provisions of section 167 of the Bengal Tenancy Act, and, subsequently on the 7th July 1911, instituted the present suit for ejectment of the defendants. The defendants pleaded that inasmuch as a half share of the interest of the plaintiff as superior landlord had been sold in execution of a mortgage decree against her on the 20th January 1909, and as, consequently, she had ceased to be the sole landlord on that date, the sale held on the 15th February 1909 operated, not as a sale under the Bengal Tenancy Act, but only as a sale of the right, title, and interest of the judgment-debtor under the Code of Civil Procedure. The trial Court overruled this contention and decreed the suit. On appeal to the Subordinate Judge, the decree of the Court of first instance was affirmed. On second appeal to this Court, Mr. Justice Mullick has held that the contention of the defendants must prevail, on the authority of the decision of the Judicial Committee in *Forbes* v. *Maharaj Bahadur Singh* (1), and in this view, he has dismissed the suit. The question of the effect of the execution-sale held on the 15th February 1909 is the sole point for consideration in the present appeal.

The history of judicial opinion on the question of the effect of the cessation, partial or entire, of the interest of a landlord on his right to enforce realisation of arrears of rent by sale of the tenancy under the special procedure prescribed in the Bengal Tenancy Act, may be briefly reviewed. In *Hem Chunder Bhunjo* v. *Mon Mohini Dassi* (2), the interest of the landlord ceased after he had obtained a decree for rent in respect of a saleable under-tenure. It was

(1) (1914) I. L. R. 41 Calc. 926. (2) (1894) 3 C. W. N. 604.

ruled by O'Kinealy and Ameer Ali JJ., that he could not thereafter bring the tenure itself to sale in execution of the decree in conformity with the special provisions of the Bengal Tenancy Act. In *Chhatrapat Singh* v. *Gopi Chand Bothra* (1), the landlord lost his interest after the institution of the suit for arrears of rent and before the decree was made in his favour. It was ruled by Macpherson and Ameer Ali JJ. that the decree so made had all the characteristics of a rent-decree under the Bengal Tenancy Act. In *Srimant Roy* v. *Mahadeo Mahata* (2), the landlord lost his interest before the institution of the suit for arrears of rent, by reason of the expiry of the term of his own lease. It was ruled by Harington and Brett JJ. that he could, in execution of his decree for rent, sell only the right, title and interest of the tenant as existing at the time of the sale. In this state of the authorities, the matter came before a Full Bench of this Court in the case of *Khetra Pal Singh* v. *Kritarthamoyi Dassi* (3). In that case, the landlord had parted with her interest after she had obtained a decree for arrears of rent and before she applied to execute the decree. It was ruled that the decree was capable of execution as a rent-decree at her instance. Sir Francis Maclean C.J. held that if at the time when the rent suit is instituted and the rent-decree made, the plaintiff is still the landlord, the decree is liable to be executed at his instance as a rent decree, notwithstanding that he has parted with his interest as landlord before he applies for execution. It may be observed that the Full Bench dissented from the decision in *Hem Chunder* v. *Mon Mohini* (4) which was indistinguishable on the facts. We come finally

(1) (1899) I. L. R. 26 Calc. 750 ; 4 C. W. N. 446.
(2) (1904) I. L. R. 31 Calc. 550.
(3) (1906) I. L. R. 33 Calc. 566.
(4) (1894) 3 C. W. N. 604.

1917

SYEDUNNESSA KHATUN v. AMIRUDDI.

MOOKERJEE J.

to the decision of the Judicial Committee in *Forbes* v. *Maharaj Bahadur Singh* (1). There, the landlord lost his interest before the institution of the suit for arrears of rent and was consequently not the landlord at the time when the decree was obtained or the application was made for its execution. A Division Bench of this Court, Rampini and Sharfuddin JJ. [*Maharaj Bahadur Singh* v. *Forbes* (2)], held that the decree operated as a decree for rent. The Court treated the decisions in *Hem Chunder* v. *Mon Mohini* (3) and *Srimant* v. *Mahadeo* (4), as overruled by the Full Bench in *Khetra Pal* v. *Kritarthamoyi* (5), although the facts of the case before the Full Bench were different from those of the case then before the Court in a material particular; namely, while in the one case the landlord had lost his interest before the institution of the suit for rent, in the other he lost his interest after he had obtained his decree for rent. The case was then taken up on appeal to the Judicial Committee, and the decision of this Court was reversed. In the elaborate judgment delivered by Mr. Ameer Ali who, it will be observed, was a party to the conflicting decisions in *Hem Chunder* v. *Mon Mohini* (3) and *Chhatrapat* v. *Gopi Chand* (6), the provisions of the Bengal Tenancy Act relating to rent were reviewed; but the Judicial Committee did not in express terms overrule the decision of the Full Bench in *Khetra Pal* v. *Kritarthamoyi* (5) and, proceeded, on the other hand, to observe that the High Court had fallen into an error in drawing an inference of law in support of their conclusion from a decision which was obviously based on facts different from those with which they had to deal. The facts of the case before us are substantially different

(1) (1914) I. L. R. 41 Calc. 926.
(2) (1908) I. L. R. 35 Calc. 737.
(3) (1894) 3 C. W. N. 604.
(4) (1904) I. L. R. 31 Calc. 550.
(5) (1906) I. L. R. 33 Calc. 566.
(6) (1899) I. L. R. 26 Calc. 750.

from those of the cases already mentioned, and, consequently, we are not called upon to consider the question which formed the subject-matter of reference to a Special Bench in *Prafulla* v. *Nasibannessa* (1), namely, whether the decision of the Full Bench has been in essence overruled by the decision of the Judicial Committee. As we have observed, we are not concluded here by any of the decisions just analysed, and we are not prepared to apply to this case isolated *dicta* from the judgment of the Judicial Committee pronounced in a case where the facts were in essential particulars different from those of the litigation before us; otherwise there would be a manifest abuse of judicial precedents which has been condemned by Lord Halsbury in *Quinn* v. *Leathem* (2), and by Lord Haldane in *Kreglinger* v. *New Patagonia Meat and Cold Storage Co.* (3). The view thus emphasised had been recognised many years earlier by Marshall C. J. in *Brooks* v. *Marbury* (4), where he observed that the language of a judicial pronouncement must be understood as spoken in reference to the facts under consideration and limited in meaning by those facts: *U. S.* v. *Burr* (5).

What, then, is the position of the parties, when tested from the point of view of principle? The plaintiff was the sole landlord at the date of the institution of the suit for arrears of rent, at the date of the decree, and at the time when the application for execution was made. The application was made in accordance with the special procedure prescribed in Chapter XIV of the Bengal Tenancy Act for execution of decrees for arrears of rent. Proceedings were thereupon taken under section 163 for simultaneous issue of

(1) (1916) 24 C. L. J. 331.
(2) [1901] A. C. 495, 506.
(3) [1914] A. C. 25, 40.
(4) (1826) 11 Wheaton 78, 90.
(5) (1808) 4 Cranch, 470, 482, 488.

1917

SYEDUNNESSA KHATUN v. AMIRUDDI.

MOOKERJEE J.

writ of attachment and proclamation of sale, and it can not be disputed that this was done in strict conformity with the position of the decree-holder at the time. Does it, then, make any difference that the decree-holder lost a part of his interest as landlord before the sale was actually held by the Court? In our opinion, the answer must be in the negative. The legal effect of the sale should depend upon the status of the decree-holder at the time the proceedings for sale were taken by the Court at her instance. She was competent to ask the Court to bring the defaulting under-tenure to sale and to adopt for that purpose the measures prescribed by the statute. Those measures were duly adopted, and the property was brought to sale in conformity therewith. The respondents have not been able to invoke the aid of any intelligible principle by which the legal effect of the sale can, under such circumstances, be made to depend, not upon the true character of the proceedings in execution duly taken, but the relative situation of the parties at the moment of the sale. We are of opinion that, in a case of this description, where the decree-holder continued to be the sole landlord at the date of the application for execution of the decree, and, in his character as landlord decree-holder, took the necessary steps for sale of the under-tenure in conformity with the statutory provisions, the effect of the execution sale is to pass the under-tenure to the purchaser, even though the decree-holder has lost his interest as landlord before the actual sale.

The result is that this appeal must be allowed, and the decree of the Subordinate Judge restored with costs of both hearings in this Court

BEACHCROFT J. I agree.

S. K. B. *Appeal allowed.*

CRIMINAL REVISION.

Before Teunon and Richardson JJ.

LALIT MOHAN CHAKRAVARTI

v.

HEMENDRA KUMAR DE.*

1917

June 6.

Brothel—Order of Magistrate directing discontinuance of use of house as such—Jurisdiction of District Magistrate to stay order—Eastern Bengal and Assam Disorderly Houses Act (II of 1907), ss. 2, 3.

The District Magistrate has no jurisdiction under the law to interfere with the order of a Criminal Court under s. 3 of the Eastern Bengal and Assam Disorderly Houses Act (II of 1907) and stay its operation.

Rajani Khemtawalli v. *King-Emperor* (1) referred to.

THE opposite parties Nos. 1 and 2, Harendra Kumar De and S. B. Basak, were the owners, respectively, of Nos. 7, 25 and 26, Nabo Roy's Lane in the city of Dacca, and had let them to certain prostitutes. On the receipt of a petition, dated 30th October 1916, from several residents of the locality complaining of the disorderly use of these houses to their annoyance, the District Magistrate passed an order under s. 5(*c*) of the Eastern Bengal and Assam Disorderly Houses Act (II of 1907) directing the institution of proceedings under s. 2 of the Act against the owners and occupiers of the brothels, and made the case over to the Sub divisional Magistrate for disposal. The latter held an enquiry under s. 3 of the Act, made a local inspection and found that these premises were brothels, and were used, by bazar

* Criminal Revision No. 515 of 1917, against the order of F. W. Robertson, Additional District Magistrate of Dacca, dated March 20, 1917

(1) (1910) 14 C. W. N. 404.

1917

LALIT MOHAN CHAKRAVARTI v. HEMENDRA KUMAR DE.

prostitutes for habitual prostitution to the annoyance of the neighbours and, accordingly, by his order dated the 8th February 1917, directed the owners and occupiers of the same to discontinue such use of them within 15 days from date. The owners of the houses thereupon moved the Additional District Magistrate of Dacca, who passed the following order on the 20th March:—

"I have visited the locality . . . I have no doubt that the order of the Subdivisional Magistrate is necessary and desirable. . . . The owners of Nos. 7, 25 and 26 have given a written undertaking to eject the present occupiers from these houses and to only allow their occupation by women of a more respectable class. In view of this undertaking, I am willing that the order of the Magistrate remains unenforced for six months, or for so much of that period as may pass without complaint against the occupants of these houses. If in the meantime complaint is made against them, I shall consider the advisability of at once enforcing the order."

The petitioners then moved the High Court and obtained the present Rule to set aside the order of the Additional District Magistrate as *ultra vires*.

Babu Hemendra Kumar Das, for the petitioner. The order of the Additional District Magistrate is without jurisdiction and is open to revision under s. 439 of the Criminal Procedure Code. The High Court has interfered in revision in cases under the corresponding Bengal Act (III of 1906) in *Kokil Ram* v. *Emperor* (1): and see *Rajani Khemtawalli* v. *King-Emperor* (2).

Mr. J. N. Roy (with him *Babu Khitish Chandra Neogy*), for the opposite party. The District Magistrate has merely extended the time for the discontinuance of the use of the houses as brothels. His order was passed in an executive or administrative capacity, and cannot be revised under s. 439 of the Code. Refers to *Rajani Khemtawalli* v. *King-Emperor* (2).

(1) (1907) 6 C. L. J. 710. (2) (1910) 14 C. W. N. 404.

The Eastern Bengal Act has been extended to Western Bengal by Act I of 1914.

TEUNON J. In this case it appears that on a complaint made in accordance with the provisions of section 5 (*c*) of the Eastern Bengal and Assam Disorderly Houses Act, 1907, proceedings or prosecutions under section 3 were taken against the owners and occupiers of houses Nos. 7, 25 and 26 of a certain lane in the city of Dacca. On the enquiry held in accordance with the provisions of section 3 of the aforesaid Act, the enquiring Magistrate found that as a matter of fact the houses in question were used as brothels, as disorderly houses, and for the purpose of habitual prostitution to the annoyance of the inhabitants of the vicinity, that is to say, in contravention of the provisions of section 2 (*b*) of the same Act. He thereupon directed that such use of the houses in question should be discontinued within 15 days from the date of the order. The persons affected by the order moved the Additional District Magistrate of Dacca, and obtained from him an order by which he practically stayed the order of the enquiring Magistrate for a period of six months and also modified it in certain other particulars.

The question involved in this Rule is whether the District Magistrate had jurisdiction or was competent to modify the order of the enquiring Magistrate in the manner in which he has done, or in any manner whatsoever. Neither in the Act itself, nor in the Criminal Procedure Code, nor in any law that has been brought to our notice, do we find any provision which justifies the District Magistrate in interfering with an order passed by a Criminal Court in the exercise of its jurisdiction under section 3 of the Act to which we have made reference. It is also clear that if

1917

LALIT MOHAN CHAKRAVARTI v. HEMENDRA KUMAR DE.

TEUNON J.

orders made under section 3 are modified by other Magistrates difficulties would arise in applying the provisions of section 6 of the Act. We are, therefore, clearly of opinion that the Magistrate's action was wholly without jurisdiction, and in so far as it is an order modifying the trying Magistrate's order, and not an order directed to police officers, we direct that it be set aside.

RICHARDSON J. I have only one word to add with reference to the case of *Rajani Khemtawalli* v. *King-Emperor* (1) which was cited in the course of the argument. Whatever opinion may have been expressed in the judgment delivered in that case, I do not understand that any point was actually decided by the learned Judges inconsistent with our decision in the present case.

Rule absolute.

E. H. M.

(1) (1910) 14 C. W. N 404.

APPEAL FROM ORIGINAL CIVIL.

Before Sanderson C. J. and Woodroffe J.

UPENDRA NARAIN ROY

v.

JANAKI NATH ROY.*

1917

July 4.

Amendment of Plaint—Practice and procedure—Suit on a mortgage—Omission to include claims on previous mortgage and charge—Inadvertence, and bonâ fide and erroneous impression as to jurisdiction—Right of appeal—Civil Procedure Code (Act V of 1908) O. II, r. 2.

Where the Court on an application for amendment of plaint granted it without deciding the points urged but subject to any contention which the defendants might raise in answer to the claim as amended :

Held, that it was better and more regular that the question of the right to amend the plaint should have been determined before the order was made, or if this would have involved a lengthy inquiry covering the same ground as the evidence in the suit, that the hearing of the application to amend should have been adjourned to the hearing of the suit and determined on the evidence then taken.

The Court being desirous of getting at the true facts will allow an amendment subject to the three chief conditions : that there is good faith on the part of the applicant ; possibility of amendment without such prejudice to the other party as cannot be compensated by costs ; and, lastly, that the amendment is not such as to turn a suit of one character into a suit of another character.

Order II, r. 2 of the Civil Procedure Code refers to a case where there has been a suit in which there has been an omission to sue in respect of portion of a claim and a decree has been made in that suit. In that case a second suit in respect of the portion so omitted is barred.

In a case, where the suit has not been heard but a claim has been omitted by inadvertence, an amendment may be allowed.

Quœre : Whether there was an appeal or not from an order of amendment in this case.

APPEAL by Upendra Narain Roy, the first defendant.

* Appeal from Original Civil, No. 28 of 1917, in Suit No. 1234 of 1916.

1917

UPENDRA NARAIN ROY v. JANAKI NATH ROY.

On the 7th January, 1914, one Upendra Narain Roy mortgaged his undivided half share in certain zamindaries in the mofussil to Rai Janaki Nath Roy Bahadur and Rai Sita Nath Roy Bahadur for Rs. 1.50,000 and interest, and on the 11th December, 1914, he created a further charge on the same properties in their favour to secure the payment of a further sum of Rs. 90,000 and interest. On the 1st April, 1915, Upendra Narain Roy, after having purchased from the trustees of his brother's estate, the latter's undivided half share in the said mofussil zamindaries, mortgaged the entire interest in the same together with his interest in certain immoveable properties situate in Calcutta and in Darjeeling, to Janaki Nath Roy and Sita Nath Roy in consideration for the sum of Rs. 4,10,000. In this mortgage it was provided, *inter alia*, that the properties situate in Calcutta and Darjeeling were subject to an Indenture of Mortgage made also on the 1st April, 1915, between Upendra Narain Roy and the said trustees, and that the undivided half share of the mofussil properties were subject to the mortgage of the 7th January, 1914, and to the charge of the 11th December, 1914. It was further provided that the payment of the abovementioned sums of Rs. 1,50,000, Rs. 90,000 and Rs. 4,10,000 and the interest thereon, respectively, should stand charged on the whole of the properties and that mortgaged properties should not be redeemed or redeemable until all the said three sums together with the interest were fully paid off and satisfied.

On the 30th November, 1915, Upendra Narain Roy executed a mortgage for Rs. 28,047 in favour of one Haridas Shome in respect of all his said properties subject to the abovementioned encumbrances thereon. In a mortgage suit instituted by the trustees against Upendra Narain Roy on the 6th July, 1915, Janaki

Nath Roy and Sita Nath Roy were not made parties at first, but were subsequently added as such.

On the 9th December, 1916, Janaki Nath Roy and Sita Nath Roy instituted a suit against Upendra Narain Roy, the trustees and Haridas Shome for the recovery of Rs. 4,10,000 due by the first defendant on the mortgage of the 1st April, 1915. In this suit the plaintiffs omitted to include their claims on the mortgage, dated the 7th January, 1914, and on the further charge, dated the 11th December, 1914, though in their plaint they made mention of these amounts. All the defendants entered appearance, but the first defendant alone filed a written statement. On the 18th January, 1917, the first defendant instituted a suit against the plaintiffs, Janaki Nath Roy and Sita Nath Roy, in the Court of the Subordinate Judge of Pabna for a declaration that the debts secured by the previous mortgage and the further charge, *viz.*, the sums of Rs. 1,50,000 and Rs. 90,000, respectively, were unenforceable in law, and that the plaintiffs were not entitled to recover the same or any portion thereof from this defendant. He alleged that the plaintiffs had intentionally omitted to sue for the amounts of their debts and relied on Order II, r. 2 of the Civil Procedure Code, under which leave had to be obtained by the plaintiffs in their abovementioned suit.

On the 19th February, 1917, the plaintiffs entered appearance in this latter suit and filed their written statement. On the 26th February, 1917, the plaintiffs applied for amendment of their plaint. In their petition verified by an affidavit of their attorney they alleged that they omitted their claims under the mortgage of the 7th January, 1914, and the charge of the 11th December, 1914, under the *bonâ fide* and erroneous impression that the High Court had no jurisdiction to entertain any suit in respect of these

1917

UPENDRA NARAIN ROY v. JANAKI NATH ROY.

claims as they comprised properties all outside the local limits of the Ordinary Original Civil Jurisdiction of the High Court and that they had also inadvertently overlooked the provisions in the mortgage of the 1st April, 1915, requiring them to include these claims in seeking to recover their debt thereunder. At the hearing of the application, the first defendant relied on s. 10 of the Civil Procedure Code. On the 9th March, 1917, Mr. Justice Chitty, after setting out the circumstances, under which the application was made, gave judgment as follows :—

"It appears to me impossible on the materials placed before me to decide now these questions which will properly be put into issue in this suit when it comes on for hearing. The amendment may, I think, be made. It will of course be subject to any contentions which the several defendants may raise in answer to the claim as amended. I cannot see that they are in any way prejudiced by the amendment being allowed, instead of having a lengthy enquiry and a practical decision of the suit as based on these two mortgages in a chamber application. The amendment is accordingly allowed. Costs cost in the cause."

The first defendant, thereupon, appealed.

Mr. C. R. Das (with him *Mr. N. Sircar*), for the respondents, took the preliminary objection that no appeal lay from the order amending the plaint. Such an order was not a judgment, especially when the order reserved the consideration of all objections that the several defendants might raise in answer to the claim as amended.

Mr. Jackson (with him *Mr. I. B. Sen*), for the appellant, submitted that an appeal did lie from the order granting leave to amend, and referred to *Hadjee Ismail Hadjee Hubbeeb* v. *Hadjee Muhomed Hadjee Joosub* (1) If the order were not allowed to stand, the appellant would be prejudiced to the extent of Rs. 2,40,000.

(1) (1874) 13 B. L. R. 91.

Mr. N. Sircar. The merits of the question between the parties were not decided by the learned Judge when he made the order for amendment. All that was decided was that when the suit would come on for hearing the rights between the parties would be debated, the propriety or impropriety of the amendment proposed being reserved till then. This order was not a judgment within the meaning of cl. 15 of the Letters Patent as defined by Couch C. J. in *The Justices of the Peace for Calcutta* v. *The Oriental Gas Co., Ld.* (1). Every order did not amount to a judgment within cl. 15 of the Letters Patent. *See* Woodroffe's Civil Procedure Code, 2nd Edn., p. 55, as regards the nature of orders which have been held to be judgments. The appellant was not prejudiced in his suit by this order of amendment. However, to further protect his interest in his suit in the Court of the Subordinate Judge at Pabna, the judgment of Mr. Justice Chitty might be amended by the addition of the words "and without prejudice to the defendants' rights in the Pabna suit."

Mr. Jackson. Anything which interfered with the rights of the appellant in respect of his mortgage was a judgment. If the order for amendment of the plaint were allowed to stand, the appellant would be seriously prejudiced to the extent of Rs. 2,40,000. *Hadjee Ismail Hadjee Hubbeeb* v. *Hadjee Mahomed Hadjee Joosub* (2), *Budhu Lal* v. *Chattu Gope* (3) and *Mathura Sundari Dasi* v. *Haran Chandra Saha* (4) were relied on.

[The Court allowed Mr. Jackson to argue on the merits of the appeal without deciding the preliminary objection.]

(1) (1872) 8 B. L. R. 433.
(2) (1874) 13 B. L. R. 91.
(3) (1916) I. L. R. 44 Calc. 804; 21 C. W. N. 269.
(4) (1915) I. L. R. 43 Calc. 857.

1917

UPENDRA NARAIN ROY v. JANAKI NATH ROY.

Mr. Jackson (continued). As regards the merits of this appeal, Mr. Justice Chitty should have refused the application for amendment. The plaint in this suit was bad on the face of it. The omission of the claims under the previous mortgage and the further charge deprived the plaintiffs of their right to proceed in this suit as framed. Before an amendment could be made it was necessary first of all to determine the plaintiffs' right to the amendment, and not to leave the determination of that right until the hearing of the suit. A plaint which was bad *ab initio* could not be converted into a good one by an amendment being made: *Gunnaji Bhawaji* v. *Makanji Khushalchand*(1).

[*Mr. C. R. Das.* That case was reversed on appeal (2).]

Under Order II, r. 2, of the Civil Procedure Code, this suit in the form in which it was instituted would have been dismissed at the hearing in consequence of the omission, and the appellant would have become entitled to the declaration which he sought in his Pabna suit. The effect of the amendment was to deprive the appellant not only of his right to the dismissal of this suit, but also of the benefit of the decree in his favour in the Pabna suit which might now be prejudiced by the order of amendment. The omission in the present case was *mala fide* and the injury caused to the appellant could not be compensated by payment of costs. The respondents ought not to be allowed to set up fresh claims in their suit: *Tildesley* v. *Harper* (3), *Weldon* v. *Neal* (4), *Lancaster* v. *Moss* (5), *Indigo Company* v. *Ogilvy* (6),

(1) (1908) 10 Bom. L. R. 969.
(2) (1909) I. L. R. 34 Bom. 250.
(3) (1878) 10 Ch. D. 393.
(4) (1887) 19 Q. B. D. 394.
(5) (1899) 15 T. L. R. 476.
(6) [1891] 2 Ch. 31.

Dhani Ram Shaha v. *Bhagirath Shaha* (1) and *Cropper* v. *Smith* (2).

Furthermore, the order allowing the amendment was extraordinary, inasmuch as it allowed the amendment subject to any contention which the several defendants might raise in answer to the claim as amended. There seemed to be no reported English case which followed such a procedure.

Finally, the order as to costs was clearly wrong. It should have been made against the party who applied for the amendment and not costs in the cause.

Mr. C. R. Das (*contra*). The application for amendment was *bonâ fide*. On the facts stated the omission was by mere inadvertence and in support of this contention there was the affidavit of the respondents' attorney. No argument was put forward by the appellant to discredit this affidavit. Order II, r. 2, of the Civil Procedure Code, was a bar not to an amendment, but only to the institution of a second suit. The amendment should be allowed as a matter of course unless a grave injustice would be done to the appellant. There was no objection to this Court protecting the appellant's rights in the suit in the Pabna Court and to the amending of Mr. Justice Chitty's order accordingly, but on the facts as disclosed in the affidavits there was ample material for a decision on the merits of the application for amendment of the plaint, and the respondents would be satisfied with a decision on the facts.

Mr. I. B. Sen, in reply. The amendment being allowed to stand would take away the whole basis of the appellant's suit at Pabna. The order of amendment of the plaint did not protect the appellant's rights in the suit in the Pabna Court. That order as

(1) (1895) I. L. R. 22 Calc. 692. (2) (1884) 26 Ch. D. 700.

1917

UPENDRA NARAIN ROY v. JANAKI NATH ROY.

it stood was a judgment and from it an appeal would lie. If it be held that that order protected the appellant's rights in that suit, then no appeal would lie from it. This Court would in the latter instance have no seisin of the case at all and, therefore, no jurisdiction to amend that order as suggested by the respondents. The respondents' suggestion amounted to this, *viz.*, that *firstly*, this Court should hold that an appeal lay from the order of amendment; *secondly*, this order should be amended; and, *finally*, this Court should hold that from the order as amended no appeal lay, obviously such a suggestion could not be adopted. If this Court were to hold that there was no appeal, it would have no right to vary the order of amendment.

Under Order II, r. 2, of the Civil Procedure Code, the bar to the subsequent suit was the institution of the first suit. The view set out in Woodroffe's Civil Procedure Code, 2nd edn., p. 576, was adopted.

Cur. adv. vult.

WOODROFFE J. The respondents instituted this suit on the 9th December, 1916, against the defendants for recovery of money due to them by the first defendant on a mortgage of the 1st April, 1915. There were a previous mortgage, and a further charge, dated 7th January, 1914, and 11th December, 1914, executed by the same defendant. But these were not included in the suit. On the 26th February, 1917, the plaintiffs gave notice of an application for amendment of the plaint. The affidavit which is verified by the plaintiffs' attorney states that they did not include their claims under the previous mortgage and charge under the *bonâ fide* and erroneous impression that this Court had no jurisdiction to entertain any suit in respect

of the mortgage and charge as they comprised properties outside the local limits of our jurisdiction. They say they overlooked one of the provisions of the mortgage of the 1st April, 1915. It is said that the defendant taking advantage of the omission to include these previous claims filed a suit in the Court of the Subordinate Judge at Pabna, praying for a declaration that the mortgage debts secured by the previous mortgage and charge were unenforceable. The ground there taken is that no leave was obtained under Order II, rule 2, of the Civil Procedure Code; that the defendant in that suit intentionally omitted to sue in respect of these sums of Rs. 1,50,000 and Rs. 90,000, and that the plaintiff in that suit was entitled to a declaration that the defendant's mortgage lien for these two sums was unenforceable in law.

The plaintiffs' application for amendment in this suit is supported by an affidavit verified by his attorney, Mr. P. C. Kar. On the other hand, there is an affidavit of Kedarnath Sirkar, a *gomashta* and law-agent of the defendant.

He alleges that the prior mortgage and charge were not included designedly and with dishonest motives and not under error as alleged. His affidavit is supported by his master. These allegations are denied in the affidavit of Rai Bahadur Janaki Nath Roy, who explains how these claims were omitted. The matter came before Chitty J., who thought it was not possible or convenient to decide the issue of fact raised at that stage. He, however, without deciding anything, made the amendment subject to any contention which the several defendants might raise in answer to the claim as amended. The learned Judge said that he did not see how the defendants would be prejudiced by the amendment being allowed instead of having a lengthy enquiry and a practical

1917

UPENDRA NARAIN ROY v. JANAKI NATH ROY.

WOODROFFE J.

decision of the suit in a chamber application. I think it would have been better and more regular that the question of the right to amendment should have been determined before the order was made, or, if this would have involved a lengthy enquiry covering the same ground as the evidence in the suit, that the hearing of the application to amend should have been adjourned to the hearing of the suit and determined on the evidence then taken. Objection has accordingly been taken by Mr. Jackson for the appellant on the ground that an order should not have been made without first determining the plaintiffs' right to it. How he asks, can the Court make an order for amendment subject to the right of the party to object that it ought not to have been allowed? The respondents' counsel also states that he was desirous of and asked the Court to hear the application on the facts. In support, however, of the course which the learned Judge took, it must be noted that the Court minutes show that Mr. Chakravarti, who appeared for the appellant in the lower Court, said that as long as his rights were safeguarded and it was understood that his contention was that the omission to sue was not a mistake but was done advisedly, he had no objection.

The matter is, however, not of importance as I have come to the conclusion on the facts that the order made was justified.

It has been objected in the first instance that no appeal lies. No case has been cited in support of the appeal. Ordinarily an order granting or refusing amendment would not be a "judgment." Such an order does not determine the rights of the parties but only a matter of procedure, namely, whether a right may be put forward for determination. Here the Court has held that it may. If the Court were wrong, the order

would be subject to appeal in the appeal against the final decree. But here the question is complicated by the fact of the Pabna suit. It is contended for the appellant that the order made does not reserve the alleged right of the appellant in that Pabna suit and that the rights of the appellant in that suit are affected, and, to use the words of counsel, "his basis in the Pabna suit is gone." It is argued that when that suit was instituted, the respondents had not included their previous mortgage and charge in the plaint in this Court and that if the matters had continued as they originally were, the appellant would have got the declaration he sought. These chances of success, it is said, are now spoiled because the respondents have been allowed to amend in this Court so as to include claims, the omission of which was made the basis of the Pabna suit. It is also suggested that the hearing of the Pabna suit might be affected. This is not possible because the Pabna suit was instituted before the amendment, and if there were any difficulty in the two suits being concurrently heard (on the assumption that they covered the same ground), it would be the Calcutta suit as amended and not the Pabna suit which might be affected. As regards the other point it has more ingenuity than substance. It proceeds on the erroneous assumption that the amendment was prohibited by Order II, rule 2. This rule does not touch the matter before us. It refers to a case where there has been a suit in which there has been an omission to sue in respect of portion of a claim, and a decree has been made in that suit. In that case a second suit in respect of the portion so omitted is barred. That is not the case here. In the present case the suit has not been heard but a claim has been omitted by, it is said, inadvertence. To hold that in such case an amendment should

1917

UPENDRA NARAIN ROY v. JANAKI NATH ROY.

WOODROFFE J.

not be allowed would be to hold something which the rule does not say and which would be absurd. The rule says "he shall not afterwards sue," that is, it assumes that there has been a suit carried to a decision, and a subsequent suit. It does not apply to amendment where there has been only one suit As the plaintiff had in law a right to apply for an amendment before the conclusion of his suit, it cannot be said that any rights of the appellant in the Pabna suit are affected. Such a contention is based on the erroneous assumption that nothing could be done by way of amendment of the Calcutta suit to remove the objection that the claims on the previous mortgage or charge were not sustainable. A case would fall within Order II, rule 2, only if a plaintiff fails to apply for amendment before decree, and then brings another suit. The plaintiffs are not doing that but asking for amendment in the one and only suit they have brought. This is, therefore, not a case in which the amendment either affects rights accrued to the other party, or otherwise prejudices him.

It has doubtless been held that where a person knows of the facts before the institution of the suit and omits to make a particular claim by an oversight, it is no answer to say that such omission was due to mere mistake, and was not actuated by any fraudulent or dishonest motive. If the words of a law are clear and positive, they cannot be contested by any consideration of the motives of the party to whom it is to be applied, nor limited by what the judges who apply it may suppose to have been the reasons for enacting it: *Moonshee Buzloor Ruheem* v. *Shumsoonnissa Begum* (1), *Bulwunt Singh* v. *Chittan Singh* (2), *Ganes*

(1) (1867) 11 Moo. I. A. 551, 605. (2) (1871) 3 N. W. P. H. C. R. 27.

Chandra Chowdhry v. *Ram Kumar Chowdhry* (1), *Syed Abdulla* v. *Hurkishen Singh* (2). But these observations apply only where there has been a suit and a decree and a subsequent suit in which such mistake is pleaded and not to such a case as is before us. It has been argued that the bar under Order II, rule 2, exists not because a point has been decided but because it should and would have been decided if the plaintiff had put it forward. This is quite true, but is not to the point. The observation assumes that there has been a suit and a decree in which the point omitted might have been considered and determined. In the present case we are now in only a preliminary stage of a suit in which no decree has been made and there has been no anterior suit.

As regards the power of amendment, the Code says:—"The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

The Court being desirous of getting at the true facts will allow an amendment subject to three general conditions: *Bonâ fides* on the part of the applicant; possibility of amendment without such prejudice to the other party as cannot be compensated by costs (such as prejudice to rights accrued) and subject to this that the amendment is not such as to turn a suit of one character into a suit of another character. This statement is not made as being exhaustive but as embodying what are perhaps the three chief conditions on which amendment may be allowed. So it has been held that:—Where a party who

(1) (1869) 3 B. L. R., A. C. J. 265. (2) (1905) 2 C. L. J. 490.

1917

UPENDRA NARAIN ROY v. JANAKI NATH ROY.

WOODROFFE J.

has an honest case has either through ignorance [see *Mukhoda Soondury Dasi* v. *Ram Churn Karmokar* (1), *Krisnaji* v. *Wamnaji* (2)], *bonâ fide* mistake or some misapprehension not placed the real facts before the Court [see *Bhyro Dutt* v. *Mussamut Lekhranee Kooer* (3), *Lakshmibai* v. *Haribin Ravji* (4)] or has misconceived his cause of action and form of suit [*Ragho Parashram* v. *Vishnu Govind* (5), *Shyam Chand Koondoo* v. *The Land Mortgage Bank of India, Ld.* (6), *Krishnaji Lakshman Rajvade* v. *Sitaram Murarrav Jakhi* (7)] he should be allowed to amend, where this may be done without injustice to the defendant, and in appeal, particularly where the objection that the suit was not maintainable was not taken in the first Court: *Ragho Parashram* v. *Vishnu Govind* (5), *supra*. Where, however, there is reason to think that an omission to claim was deliberate, it would, it has been said, generally not be proper to allow amendment [*Lukhee Kant Doss Chowdhry* v. *Sumeerooddi Tustar* (8)]. In short, the object of a trial being to get at the rights of the parties, any amendment which may be required for that purpose should, subject to well-known general principles governing this matter, be allowed. It has been held that apart from the question of limitation, it is unjust to a plaintiff to put him to the great expense of a new suit when a reasonable amendment, not inconsistent with his case as it originally stood, might equally well answer his purpose as the new suit [*R. and N. Modhe v. S. Dongre* (9)]. Here there is not merely a question of expense for if the

(1) (1882) I. L. R. 8 Calc. 871, 875.
(2) (1893) I. L. R. 18 Bom. 144.
(3) (1871) 16 W. R. 123.
(4) (1872) 9 Bom. H. C. R. 1.
(5) (1903) 5 Bom. L. R. 329.
(6) (1883) I. L. R. 9 Calc. 695, 698.
(7) (1880) I. L. R. 5 Bom. 496.
(8) (1874) 21 W. R. 208.
(9) (1881) I. L. R. 5 Bom. 609, 613, 614.

amendment were refused it might be that the plaintiffs would be altogether debarred of their remedy in respect of the previous mortgage and further charge, the *factum* of which is not denied.

Assuming then but not deciding in favour of the appellant that there is an appeal, the grounds put forward to show that the order appealed from is erroneous are in themselves without substance. The appellant has asked us to deal with the facts and we do so. It may be a matter of doubt whether there is an appeal or not, but, assuming this in favour of the appellant, his case fails on the facts.

In my opinion there is no sufficient ground for disbelieving the affidavit verified by the attorney that the claims were omitted by inadvertence. The evidence before us does not justify the conclusion that the omission was deliberate and dishonest as alleged. I may here record the fact that Mr. Jackson contended that it was not necessary that he should establish his client's case on this point, and that apart from it the law prohibited amendment. In my opinion, and on a full consideration of the facts and law, I am of opinion that the amendment made was justified. The appeal, therefore, fails and is dismissed with costs.

We have been asked to vary Mr. Justice Chitty's order in the first Court as regards costs. He made the costs of the application for amendment costs in the cause. This matter, of course, was one within his discretion, with which I think we ought not to interfere unless it is shown that he was clearly wrong. This was not a case in which the party seeking the amendment alleged an error on his part which was admitted by the other side and in which no opposition was made to the amendment, in which case an order might have been that the party seeking the amendment

1917

UPENDRA NARAIN ROY v. JANAKI NATH ROY.

WOODROFFE J.

should pay costs. In this case the opposite party opposed this application for amendment on the grounds which have been mentioned in my judgment: and it is not unlikely that for this reason the learned Judge did not determine the facts on this point and ordered the costs to be costs in the cause. The learned Judge's order as regards costs will stand, and, as I have said, the appeal is dismissed with costs.

SANDERSON C. J. I agree.

Appeal dismissed.

O. M.

Attorney for the appellant: *Dhirendra Nath Mitter.*

Attorneys for the respondents: *Kar, Mehta & Co.; Kumar Krishna Dutt; Sailendra Mohan Dutt.*

PRIVY COUNCIL.

P.C.*
1917

June 26, 28, 29; *July* 26.

MAUNG KYIN

v.

MA SHWE LA.

[ON APPEAL FROM THE CHIEF COURT OF LOWER BURMA.]

Evidence, admissibility of—Evidence Act (I of 1872) s. 92—Evidence of acts and conduct of parties to deeds showing that they were mortgages when in form they were absolute transfers—Fraudulent dealing with property which the parties knew belonged to a third person not a party to deeds.

The language of s. 92 of the Evidence Act, 1872, with regard to a "contract, grant or disposition reduced to writing," in terms applies, and applies alone; "as between the parties to any such instrument, or their representatives in interest." Wherever, accordingly, evidence is tendered

* *Present:* LORD DUNEDIN, LORD SHAW, LORD SUMNER, SIR JOHN EDGE AND MR. AMEER ALI.

as to a transaction with a third party, it is not governed by the section or by the rule of evidence which it contains, and in such a case, therefore, the ordinary rules of equity and good conscience come into play unhampered by the statutory restrictions.

The principles of equity, which are universal, forbid a person to deal with property which he knows he holds on security, and not in actual ownership.

In this case both the grantor and grantee in transactions by deed regarding certain land were shown by the evidence to have dealt with it with the knowledge that it belonged to a third person who was not a "party to the deeds or a representative in interest of a party" to them. It was alleged that the deeds, though in form absolute transfers of the property, were intended to be only mortgages or transfers of mortgages.

Held, that section 92 of the Evidence Act was no bar to the admission of evidence to show what was the true nature of the transactions : it did not prevent fraudulent dealing with a third person's property. Evidence as to that third party's rights is admissible, and, if admissible, is most relevant.

The series of cases cited in the judgment, of which *Baksu Lakshman* v. *Govinda Kanji* (1) is an example, in which it has been decided that, notwithstanding the terms of section 92, evidence is admissible to show the acts and conduct of the parties to such deeds as inconsistent with the absolute transfer of the property, and only consistent with the true nature of the transaction having been one of mortgage or transfer of mortgage, ceased to have any binding authority after the decision by the Board in *Balkishen Das* v. *Legge* (2) in which it was held that oral evidence was not admissible for the purpose of ascertaining the intention of parties to written documents ; and that the cases in the English Court of Chancery had no application to the law of India as laid down in the Acts of the Indian Legislature.

Achutaramaraju v. *Subbaraju* (3), *Maung Bin* v. *Ma Hlaing* (4) and *Dattoo valad Totaram* v. *Ram Chandra Totaram* (5) referred to, as being cases in which the judgment of the Board in *Balkishen Das* v. *Legge* (2) had been rightly followed and applied.

APPEAL No. 126 of 1915 from a judgment and decree (3rd August 1914) of the Chief Court of Lower Burma on its Appellate Side, which reversed a judgment and decree (17th June and 18th July 1912) of the same

(1) (1880) I. L. R. 4 Bom. 594.
(2) (1899) I. L. R. 22 All. 149 ; L. R. 27 I. A. 58.
(3) (1901) I. L. R. 25 Mad. 7.
(4) (1905) 3 L. B. Rul. 100.
(5) (1905) I. L. R. 30 Bom. 119.

1917

MAUNG KYIN v. MA SHWE LA.

Court on its Original Side, on a new trial of the suit in pursuance of an Order (8th August 1911) of His Majesty in Council.

Maung Kyaw (heir and legal representative of Maung Kyin, the defendant, and Ma Ngwe Zan, deceased) was the appellant to His Majesty in Council.

The facts of the case are sufficiently stated in the judgment of the Judicial Committee. The former hearing of the case in the Privy Council will be found reported in I. L. R. 38 Calc. 892.

Under the above order in Council the case was re-tried by ROBINSON J. on 31st May, and 5th and 6th June 1912. By consent the issues settled at the former hearing were taken as being the issues on the re-trial, and it was agreed that the question of fraud was sufficiently covered by the second issue, namely, "If defendants were mortgagees only, had U Shwe Pe and Ma Shwe La actual or constructive notice of such fact"?. Further evidence, both oral and documentary, was adduced and put in on behalf of the appellant and the respondents. All the evidence with reference to the deeds of 4th March 1903 (Exhibits A and B) was objected to by the respondents on the ground that it was inadmissible. Ko Myaing and his daughter Ma Pwa O being dead at the date of the trial, the appellant tendered as evidence under section 33 of the Evidence Act, 1872, depositions made by them in a former suit (16 of 1904 of the Chief Court of Lower Burma), together with the pleadings and issues in that suit. That evidence was objected to on behalf of the respondents as not being admissible under section 33, but the Court disallowed the objection and admitted the evidence. Thereupon, the depositions of two other persons (who had also died before the trial) in the same suit were put in as evidence on behalf of the respondents.

Suit 16 of 1904 was filed by one Munnee against U Myaing, R. M. Morrison, U Shwe Pe, Ma Shwe La, Somasoonderam Chetty, and Maung Kyaw (the present appellant) for specific performance of a contract made by Morrison (U Myaing's attorney and mortgagee) for the sale of certain of the lands comprised in the mortgage of 21st May 1895 (Ex. 3) including hereditament. A. Somasoonderam Chetty was made a defendant because it was alleged that U Myaing had by a registered deed, dated 11th of January 1904, agreed to sell the lands in suit to him. Maung Kyaw was made a defendant because it was alleged that the Chetty had by registered deed, dated 10th February 1904, assigned the said agreement to him. It was recited in Exhibit 6 that Maung Kyaw took such assignment as trustee for Maung Kyin. In that suit it was alleged by U Myaing that the transactions evidenced by Exhibits B and C were mortgages and transfers of mortgages, and not sales, whereas U Shwe Pe contended that they were sales. An issue was framed upon the question and upon that issue the depositions put in under section 33 of the Evidence Act were taken.

On 17th June 1912, ROBINSON J. gave judgment and held that U Myaing and Maung Kyin intended to be and were in the position of debtor and creditor, and intended the transactions represented by Exhibits C and D to be mortgages and not sales; that U Myaing's object in the negotiations which resulted in Exhibits A and B was to transfer those mortgages to U Shwe Pe, and that the latter knew this and agreed to take over the mortgages; and that U Shwe Pe was guilty of fraud in taking the deeds of sale. ROBINSON J. held therefore that the respondents were not entitled to possession of the hereditaments and that their suit failed, and it was dismissed with costs.

1917

MAUNG KYIN v. MA SHWE LA.

On appeal by the respondents an Appeal Bench of the Chief Court (HARTNOLL, Officiating C. J., and ORMOND J.) delivered separate judgments allowing the appeal.

Ormond J. held that the appellants were precluded from showing that the transactions were other than sales, but he dealt with the question in view of the order of the Privy Council, and after holding that the evidence admitted under section 33 of the Evidence Act was inadmissible, found that on the other evidence adduced the findings of Robinson J. that when Exhibits A and B were executed Maung Kyin and Ma Ngwe Zan to the knowledge of U Shwe Pe and Ma Shwe La were merely mortgagees, and that it was intended by all parties that the mortgages only should be transferred to U Shwe Pe and Ma Shwe La were correct. He held further that U Myaing knew the nature of the instruments (Exhibits A and B) and that therefore there was no antecedent fraud; that Maung Kyin and Ma Ngwe Zan did not allege fraud on the part of U Shwe Pe at the time of, or antecedent to, the execution of Exhibits A and B, and that being so they were precluded by the Full Bench ruling in *Maung Bin* v. *Ma Hlaing* (1) from showing that these transactions were transfers of mortgages and not outright sales, and from showing that at the date of those documents they were in fact only mortgages because such evidence would be relevant only for the purpose of showing that it was intended that the transactions should be transfers of mortgages. He concluded as follows:—

"My view of the case then, is shortly this: The defendants do not allege any fraud on the part of U Shwe Pe at the time of or antecedent to the execution

(1) (1905) 3 L. B. Rul. 100.

of Exhibits A and B, either against U Myaing or against the defendants. That being so, the defendants are precluded by the Full Bench ruling from showing that the transaction evidenced by Exhibits A and B was a transfer of mortgages and not outright sales. And they are precluded from shewing that at the time of these documents they (the defendants) were in fact only mortgagees; because such evidence would be relevant only for the purpose of showing that at the time of the execution of Exhibits A and B, it was intended that the transaction should be a transfer of the defendant's mortgages. If, however, evidence is admissible for the purpose of showing what was the real transaction; the facts (apart from the evidence which has been admitted under section 33 of the Evidence Act) would clearly show that the parties concerned, *viz.*, U Myaing, defendant Maung Kyin and U Shwe Pe all intended that U Shwe Pe and his wife should take a transfer of the defendant's mortgages in the form of outright sales."

Hartnoll, Offg. Chief Judge, held that the evidence tendered under section 33 of the Evidence Act was rightly admitted. He agreed with ORMOND J. and ROBINSON J. that Exhibits C and D were intended to operate as mortgages and Exhibits A and B as transfers of mortgages, but held, agreeing with Ormond J., that no fraud had been proved against U Shwe Pe and Ma Shwe La antecedent to the execution of Exhibits A and B. As however according to the above Full Bench ruling oral evidence was not admissible to vary the documents, he held that the appeal should be allowed.

On the deaths of Maung Kyin and Ma Ngwe Zan, Maung Kyaw was by order of the Chief Court substituted on the record as the sole heir and legal representative of the two deceased parties.

1917

MAUNG KYIN v. MA SHWE LA.

On this appeal,

Sir H. Erle Richards, *K. C.*, and *F. J. Coltman*, for the appellant, contended that the Appellate Court was in error in holding that he had not proved against the respondent's fraud in relation to matters antecedent to the execution of the deeds of 4th March 1903, in rejecting under section 92 of the Evidence Act, 1872, evidence of a fraudulent dealing with U Myaing's property, and in not holding that the respondent's dealing with it was fraudulent. The Appellate Court should have found that U Shwe Pe and Ma Shwe La had notice that the property purporting to be conveyed to them belonged to U Myaing, a third party, who was not a party to the conveyances. The evidence on the retrial showed that these were concurrent findings, that they were taken with knowledge that U Myaing was the owner. That being so, according to the decision when the case was before the Board on the former appeal (1) section 92 of the Evidence Act was not applicable. The appellant stood in the place of U Myaing, as he was the holder of the equity of redemption. But even if section 92 did apply it would not exclude extrinsic evidence as to the acts and conduct of the parties (which the Appellate Court below had rejected) to show what the true nature of the transaction was. Reference was made to *Baksu Lakshman* v. *Govinda Kanji* (2), *Hem Chunder Soor* v. *Kally Churn Das* (3), *Rakken* v. *Alagappudayan* (4), *Preonath Shaha* v. *Madhu Sudan Bhuiya* (5), *Khankar Abdur Rahman* v. *Ali Hafez* (6) and *Mahomed Ali Hossein* v. *Nazar Ali* (7). The cases to the

(1) (1911) I. L. R. 38 Calc. 892; L. R. 38 I. A. 146.
(2) (1880) I. L. R. 4 Bom. 594.
(3) (1883) I. L. R. 9 Calc. 528, 533.
(4) (1892) I. L. R. 16 Mad. 80.
(5) (1898) I. L. R. 25 Calc. 603.
(6) (1900) I. L. R. 28 Calc. 256.
(7) (1901) I. L. R. 28 Calc. 239.

contrary, *Achutaramaraju* v. *Subbaraju* (1), *Maung Bin* v. *Ma Hlaing* (2) and *Dattoo valad Totaram* v. *Ram Chandra Totaram* (3) were decided on an erroneous interpretation of the judgment of the Board in *Balkishen* v. *Legge* (4).

De Gruyther, K. C., and *T. Edwards Forster*, for the respondents, contended that no fraud had been alleged by the appellant against the respondents in the matter of the deeds antecedent to their execution, nor had any particulars of any fraud been given by the appellant in relation thereto. An agreement for sale or mortgage must be in writing [sections 54 and 59 of the Transfer of Property Act (IV of 1882), and must be registered (sections 17 and 49 of the Registration Act (III of 1877)]. Section 92 of the Evidence Act renders inadmissible oral evidence given by the parties to a deed of absolute transfer, to show that it was intended to be only a mortgage. Reference was made to *Achutaramaraju* v. *Subbaraju* (1), *Maung Bin* v. *Ma Hlaing* (2), and *Dattoovalad Totaram* v. *Ram Chandra Totaram* (3). The decisions relied upon by the appellant were cases which applied the English equitable principle laid down in *Lincoln* v. *Wright* (5) which, in *Balkishen* v. *Legge* (4), the Board held was not applicable in India. The former decision of the Board in the present case was only that if there was antecedent fraud, evidence would be admissible to prove it. Here the Courts below on the re-trial have held that there was no such fraud.

Sir H. Erle Richards, K. C., replied.

The judgment of their Lordships was delivered by

LORD SHAW. This is an appeal originally brought by the defendants Maung Kyin, since deceased, and

(1) (1901) I. L. R. 25 Mad. 7.
(2) (1905) 3 L. B. Rul. 100.
(3) (1905) I. L. R. 30 Bom. 119.
(4) (1899) I. L. R. 22 All. 149 : L. R. 27 I. A. 58.
(5) (1859) 4 De Gex. & J. 16.

1917

MAUNG KYIN v. MA SHWE LA.

Maung Kyaw, from a judgment and decree of the Chief Court of Lower Burma in its Civil Appellate Jurisdiction, dated the 3rd August, 1914, reversing the judgment and decree of the Chief Court in its Civil Original Jurisdiction, dated the 17th June, 1912. The matters in suit between the parties have, on a former occasion, formed the subject of an appeal to this Board. The judgment upon that appeal was pronounced on the 11th July, 1911, and is reported in L. R. 38 Indian Appeals, p. 146, (1). The meaning and effect of that judgment will be presently referred to.

The property which is the subject of the appeal consists of four different parcels of land situated in Kemmendine, a suburb of Rangoon. The facts of the case may be briefly stated thus: The owner of these plots of land was one Ko Shwe Myaing. On the 30th November, 1901, Myaing, having borrowed from Maung Kyin and Ma Ngwe Zan, his wife, 8,500 rupees, to bear interest at 1-8 per cent. per month, granted an out-and-out conveyance of two of these properties, which may be called (*a*) and (*b*), in favour of Kyin and his wife. No possession passed; interest was paid by Myaing and repayment of the loan to the extent of 3,500 rupees was also made. This left an unpaid balance of 5,000 rupees. On the 4th March, 1903, Kyin and his wife obtained payment of this sum from U Shwe Pe and his wife, and conveyed the properties (*a*) and (*b*) to the latter.

There were two other plots of land, which may be called (*c*) and (*d*). Kyin and his wife on the 13th February, 1902, having advanced 11,565 rupees, purchased these properties, which then also belonged to Myaing, by public auction. No possession passed. On the 4th March, 1903, Kyin and his wife transferred these properties to Shwe Pe and his wife in

(1) (1911) I. L. R. 38 Calc. 892.

consideration of a payment of 11,000 rupees, 565 rupees having in the meantime been paid by Myaing. The state of matters accordingly was that, on the date last mentioned, namely, the 4th March, 1903, U Shwe Pe and his wife became by *ex facie* absolute conveyances from Kyin and his wife vested in all the properties in suit.

Myaing was no party to these later transactions, but there is some correspondence showing that his part in the transaction was that he was desirous of having, and he obtained the benefit of, a reduction in the rate of interest from 1-8 per cent. per month to 1 per cent.

Then, on the 20th November, 1905, Myaing conveyed to the Kyins his equity of redemption. The footing upon which this deed was granted was manifestly that Myaing, notwithstanding the absolute conveyances, still considered himself as only having granted mortgages over his property, and having therefore an equity of redemption thereon, which he was free to dispose of.

U Shwe Pe having died, his widow and children brought this suit for possession of the lands, it being directed against Kyin and his wife. They resist possession being given and maintain in substance that, although the conveyances to U Shwe Pe and his wife bear to be absolute in form, it was well known to them that the true nature of the transaction was one of mortgage upon the security of the properties. In particular, it is maintained that Shwe Pe and his wife knew that Kyin and his wife, who purported to grant the conveyance in absolute terms, were not in fact the owners of the property, but themselves only lenders thereon. This is an important consideration, as will afterwards appear, because it amounts to this : that the transfer, although *ex facie* of the deeds absolute in

1917

MAUNG KYIN v. MA SHWE LA.

form, was in truth and to the knowledge of both parties a transfer *a non domino*. The dominus was Myaing, who was not a grantor. In short, the Kyins were purporting to sell and the Shwe Pes purporting to buy what both the nominal sellers and buyers knew to belong to somebody else.

When the matters in dispute were before this Board upon a former occasion, it was decided that evidence upon the topics above mentioned could be received, but no final judgment was given as to the effect to be given to such evidence after its reception.

The proof having been taken, their Lordships are now in possession of the facts and of concurrent findings upon the most important of these. It may be well to note how this stands. The learned Judge of the Chief Court (Original Civil Jurisdiction) puts the matter thus :—

"The evidence in my opinion taken as a whole, coupled with the conduct of the parties, shows that U Myaing and defendant meant their dealings resulting in Exhibits C and D to be mortgages. It is clear that U Myaing's object in the negotiations, which resulted in Exhibits A and B, was to transfer defendant's mortgage to his relative U Shwe Pe at a lower rate of interest, and U Shwe Pe's letters show he knew this and agreed to take over a mortgage. If he deliberately got deeds of sale executed, it was a gross fraud on U Myaing, and the evidence is admissible to show this. He now endeavours to profit by his fraud or has since determined to try and get the property by taking advantage of the old Burmese custom of taking a sale deed where a mortgage only was contemplated. He cannot profit by this fraud.

"I therefore hold that defendants were mortgagees only and that U Shwe Pe had notice of the fact."

Upon appeal in the Chief Court (Civil Appeal), the learned Judges held :—

"If, however, evidence is admissible for the purpose of showing what was the real transaction ; the facts (apart from the evidence which has been admitted under section 33 of the Evidence Act) would clearly show that the parties concerned, viz. : U Myaing, defendant Maung Kyin and U Shwe Pe, all intended that U Shwe Pe and his wife should take a transfer of the defendant's mortgages in the form of outright sales."

Upon the non-admissibility of the evidence reliance is placed by the respondents upon section 92 of the Indian Evidence Act of 1872. It provides that when the terms of a contract, grant, or disposition are reduced to writing "no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to or subtracting from its terms." The first proviso is to the effect that "any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud . . . . want of failure of consideration, or mistake in fact or law."

Founding upon this section, the respondents maintain that the whole of the evidence led must be rejected. On the contrary, the appellants maintain that, notwithstanding the terms of the section, they are entitled to set up and prove the acts and conduct of the parties as inconsistent with the transfer of property and only consistent with the true nature of the transaction having been one of mortgage or transfer of mortgage. They found upon a considerable body of authority to that effect, the cases cited being *Baksu Lakshman* v. *Govinda Kanji* (1), *Hem Chunder Soor* v. *Kally Churn Das* (2), *Rakken v. Alagappudayan* (3), *Preonath Shaha* v. *Madhu Sudan Bhuiya* (4), *Khankar Abdur Rahman* v. *Ali Hafez* (5), *Mahomed Ali Hossein* v. *Nazar Ali* (6) The judgment of Mr. Justice Melville in the first of these cases is repeatedly founded upon in the course of the series, in which that learned Judge expressly followed the

(1) (1880) I. L. R. 4 Bom. 594.
(2) (1883) I. L. R. 9 Calc. 528.
(3) (1892) I. L. R. 16 Mad. 80.
(4) (1898) I. L. R. 25 Calc. 603.
(5) (1900) I. L. R. 28 Calc. 256.
(6) (1901) I. L. R. 28 Calc. 289.

1917

MAUNG KYIN v. MA SHWE LA.

English equity doctrine as expressed in *Lincoln* v. *Wright* (1) by Lord Justice Turner thus :—

"The principle of the Court is that the Statute of Frauds was not made to cover fraud. If the real agreement in this case was that as between plaintiff and Wright, the transaction should be a mortgage transaction, it is, in the eye of this Court, fraud to insist on the conveyance as being absolute, and parole evidence must be admissible to prove the fraud."

In the opinion of their Lordships, this series of cases definitely ceased to be of binding authority after the judgment of this Board pronounced by Lord Davey in the case of *Balkishen Das* v. *Legge* (2). It was there held that oral evidence was not admissible for the purpose of ascertaining the intention of parties to written documents. Lord Davey cites section 92 of the Indian Evidence Act, and adds :—

"The cases in the English Court of Chancery which were referred to by the learned Judges in the High Court have not, in the opinion of their Lordships, any application to the law of India as laid down in the Acts of the Indian Legislature. The case must, therefore, be decided on a consideration of the contents of the documents themselves, with such extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of the document is related to existing facts."

Notwithstanding the decision of this Board, however, a certain conflict of authority on the subject still remains in India. But the respondents rightly refer to *Achutaramaraju* v. *Subbaraju* (3), *Maung Bin* v. *Ma Hlaing* (4), and *Datto valad Totaram* v. *Ram Chandra Totaram* (5) and in particular to the judgment of Chief Justice Jenkins in the last case. In these the judgment of the Board, as pronounced by Lord Davey, has been rightly followed and applied.

The principles of equity which are universal forbid a person to deal with an estate which he knows that he holds in security as if he held it in property. But,

(1) (1859) 4 De Gex & J. 16.
(2) (1899) I. L. R. 22 All. 149 : L. R. 27 I. A. 58.
(3) (1901) I. L. R. 25 Mad. 7.
(4) (1905) 3 L. B. Rul. 100.
(5) (1905) I. L. R. 30 Bom. 119.

to apply the principles, you must be placed in possession of the facts, and facts must be proved according to the law of evidence prevailing in the particular jurisdiction. In England the laws of evidence, for the reasons set forth in *Lincoln* v. *Wright* (1) and other cases, permit such facts to be established by a proof at large, the general view being that, unless this were done, the Statute of Frauds would be used as a protection or vehicle for frauds. But in India the matter of evidence is regulated by section 92 of the Indian Evidence Act, and it accordingly remains to be asked, What is the evidence which under that statute may be competently adduced? The language of the section in terms applies and applies alone "as between the parties to any such instrument or their representatives in interest." Wherever accordingly evidence is tendered as to a transaction with a third party, it is not governed by the section or by the rule of evidence which it contains, and in such a case accordingly the ordinary rules of equity and good conscience come into play unhampered by the statutory restrictions.

Their Lordships view the case accordingly as having been dealt with on that footing by their predecessors at the Board. Thus, while in the course of the judgment of Lord Robson reference was made to evidence which might be taken "relating to the acts and conduct of the parties as distinguished from oral evidence and conversations constituting in themselves some agreement between them," nothing was decided upon that head, except that it would give rise to important and difficult questions under the Indian Evidence Act. That question has now been settled by their Lordships, adversely to the reception of the evidence

(1) (1859) 4 De Gex &. J. 16.

1917

MAUNG KYIN v. MA SHWE LA.

But the later passage of the judgment of Lord Robson is upon a topic much more crucial to the situation which the facts proved in the case admittedly disclose:—

"Their Lordships," said he, "however, are of opinion that the case for the appellants disclosed a charge of fraud against the respondents in relation to matters antecedent to those deeds, on which much of the evidence tendered would certainly be material. Thus it is said that the respondents, or the persons under whom they claim, took absolute conveyances of property from the appellants with notice that they in fact belonged to a third person, namely, the alleged mortgagor, Ko Shwe Myaing. If this be so, section 92 of the Indian Evidence Act, even if construed according to the respondents' contention, will not avail them. It is applicable to an instrument 'as between the parties to any such instrument or their representatives in interest,' but it does not prevent proof of a fraudulent dealing with a third person's property, or proof of notice that the property purporting to be absolutely conveyed in fact belonged to a third person who was not a party to the conveyance."

Upon the facts it now turns out quite plainly, and it was, indeed, admitted in argument that, when Shwe Pe took the conveyance from the Kyins, he knew that it was a conveyance of property which belonged to Myaing, and that accordingly the grant proceeded *a non domino*. If section 92 applied, proviso I would seem to be in point, because it would be a fraud to insist upon a claim to property arising under such a transaction, the claimant knowing that the true owner had never parted with it. But, in the opinion of their Lordships, section 92 does not apply, because the evidence, the admissibility of which is in question, is evidence going to show what were the rights of a third person, namely Myaing, in the property, and there are concurrent findings to the effect that the property was in that owner and not in the Kyins, who to the knowledge of Shwe Pe never purported to dispose of it as theirs. If a purchaser for onerous consideration and without notice had been the grantee under a deed of absolute conveyance, a totally

different set of considerations would have arisen. In the present case, however, both grantor and grantee were dealing with the property of an owner who was a third person, who was not in the language of the statute either a party to the instrument or a representative in interest of a party to the instrument. The evidence led as to that third party's rights is admissible, and, if admissible, is most relevant. Their Lordships do not hold any doubt upon the subject of fact, in that respect entirely agreeing with all the Courts below. It is true that the Court of Appeal felt precluded by the terms of section 92 of the Evidence Act from agreeing with the Judge of the Chief Court, but in the opinion of the Board the section is, in the important particular last dealt with, no bar to the admission of the light on the true situation of the case.

Their Lordships will accordingly humbly advise His Majesty that the appeal be allowed, the decree of the Chief Court in its appellate jurisdiction, dated the 3rd August, 1914, set aside with costs, and the decree of the Chief Court in its original jurisdiction restored.

The respondents will pay the costs of the appeal.

J. V. W.

Appeal allowed.

Solicitors for the appellant: *Arnould & Son.*

Solicitors for the respondents: *Bramall & White.*

CRIMINAL REVISION.

Before Chitty and Richardson JJ.

1917

Aug. 10.

CHANDI CHARAN GIRI

v.

GADADHAR PRADHAN.*

Sanction for Prosecution—Sanction by Deputy Collector in appraisement proceedings—No appeal from orders in such proceedings—Jurisdiction—Subordination of such Deputy Collector to the District Judge or Commissioner of the Division—Bengal Tenancy Act (VIII of 1885), ss. 69 and 70—Criminal Procedure Code (Act V of 1898), s. 195 (6), (7) (b) (c).

A Collector, or a Deputy Collector exercising the powers of a Collector, under ss. 69 and 70 of the Bengal Tenancy Act (VIII of 1885), is a "Court" within s. 195 of the Criminal Procedure Code.

Raghoobuns Sahoy v. *Kokil Singh* (1) followed.

Abdullah Khan v. *Emperor* (2) referred to.

Proceedings under s. 69 of the Bengal Tenancy Act are civil in nature, and the Court of the Deputy Collector acting thereunder is subordinate to that of the District Judge under s. 195 (7).

Per CHITTY J. S. 195 (7) (c) is intended to apply only where no appeal lies from any decision of a particular Court, and not where a particular order is non-appealable.

Appeals from the Collector under the Bengal Tenancy Act, do not *ordinarily* lie to the Commissioner of the Division. In some cases they lie to him, and in others to the Civil Court. The Collector, in proceedings under ss. 69 and 70 of the Act by reason of s. 195 (7) (b) of the Criminal Procedure Code, is subordinate to the Court of the District Judge.

Per RICHARDSON J. Clause (c) includes both a particular case or class of cases in which no appeal lies, and a Court from which no appeal lies in any case.

Nibaran Chandra Chakrabarty v. *Akshoy Kumar Banerjee* (3) referred to.

* Criminal Revision No. 707 of 1917, against the order of W. N. Delevingne Sessions Judge of Midnapore, dated March 24, 1917.

(1) (1890) I. L. R. 17 Calc. 872. (2) (1909) I. L. R. 37 Calc. 52.
(3) (1917) 21 C. W. N., 948.

Per CHITTY J. The words "Principal Court of Original Jurisdiction" do not refer to a Court of any particular class, but to a Civil, Criminal or Revenue Court according to the nature of the case in which the question of sanction arises.

Ajudhia Prasad v. *Ram Lal* (1) referred to by RICHARDSON J.

ON the 13th November 1916 the petitioners filed an application before the Subdivisional Officer of Contai, who was also the Deputy Collector exercising the powers of a Collector, under section 69 of the Bengal Tenancy Act (VIII of 1885), for appraisement of their produce. The Deputy Collector thereupon ordered the second officer to enquire and report on the matter. The latter held a local inquiry and submitted his report, on the 12th December, stating that certain receipts had been filed by the petitioners which appeared to have been forged. The Deputy Collector dismissed the petitioners' application, on the 3rd January 1917, and granted sanction to prosecute them, under sections 209 and 471 of the Penal Code, at the instance of the opposite party. The petitioners then appealed to the Commissioner of the Burdwan Division, who refused to interfere by his order, dated 5th March, holding that the District Judge of Midnapore had jurisdiction in the matter under section 195 (7) (*c*) of the Criminal Procedure Code and not his Court. The petitioners thereafter applied to the District Judge for revocation of the sanction, but he dismissed the application on the ground that the proper Appellate Court under section 195 (7) of the Code was the Commissioner. The petitioners then moved the High Court and obtained the present Rule.

Babu Jyotish Chandra Hazra and *Babu Santosh Kumar Pal*, for the petitioner.

(1) (1911) I. L. R. 34 All., 197.

1917

CHANDI CHARAN GIRI v. GADADHAR PRADHAN.

Babu Jogendra Narain Mazumdar, for the opposite party.

Cur. adv. vult.

CHITTY J. In this case the petitioners, Chandi Charan Giri and Gajendra Barik, applied to the Subdivisional Officer of Contai, exercising the powers of a Collector, for appraisement of produce under section 69 of the Bengal Tenancy Act. In those proceedings the officer deputed to hold a local enquiry reported that the petitioners had made use of forged receipts. On this report the Subdivisional Officer refused their application, and at the instance of their opponents granted sanction for their prosecution under sections 471 and 209 of the Indian Penal Code. From that order the petitioners appealed to the Commissioner of the Burdwan Division. The Commissioner held that he had no jurisdiction, and that the Court to which the Subdivisional Officer's Court was subordinate was that of the District Judge of Midnapore under section 195 (7) (*c*) of the Criminal Procedure Code. The petitioners then applied to the District Judge, but he too threw out their application on the ground that he had no jurisdiction to entertain it. He was of opinion that the Commissioner's Court had jurisdiction, as the Court to which appeals from the decisions of a Collector, or officer exercising the powers of a Collector, under the Bengal Tenancy Act would ordinarily lie. Against the District Judge's order the petitioners applied to this Court to exercise its revisional powers, and this Rule was issued. It should be noted that, in proceedings under section 69 of the Bengal Tenancy Act, by section 70 (5) " the Collector may, if he thinks fit, refer any question in dispute between the parties for the decision of a Civil Court, but subject as aforesaid, his order shall be final, and shall, on

application to a Civil Court by the landlord or the tenant, be enforceable as a decree." There is consequently no appeal from an order of the Collector under section 70.

The Collector acting under sections 69 and 70, is a "Court" within the meaning of section 195 of the Criminal Procedure Code: see *Raghoobuns Sahoy* v. *Kokil Singh* (1). The question is, to what authority he is to be regarded as subordinate for the purposes of section 195 (*6*). Section 195 (*7*) purports to supply the answer, but it is so unfortunately worded as to leave the enquirer in much the same doubt and uncertainty as he was before. The difficulty of interpretation will be apparent if clauses (*a*) and (*b*) be omitted. Section 195 (*7*) will then read:—"For the purposes of this section every Court shall be deemed to be subordinate only to the Court to which appeals from the former Court ordinarily lie, that is to say, (*c*) where no appeal lies such Court shall be deemed to be subordinate to the principal Court of original jurisdiction within the local limits of whose jurisdiction such first mentioned Court is situate." The difficulty seems to have arisen from the attempt to provide in one clause for cases where an appeal lies as well as for those where no appeal lies.

No doubt the words "where no appeal lies" are wide enough to cover cases, where all decisions of a particular Court are made final by law, *e.g.*, a Small Cause Court, and also cases where a particular order is non-appealable, *e.g.*, the case before us. I am inclined to think that the former class of cases only was referred to by the Legislature in this section 195 (*7*). If it were not so, the word "ordinarily" in the earlier part of the sub-section would be meaningless. Further, there does not seem

(1) (1890) I. L. R. 17 Calc., 872.

1917

CHANDI CHARAN GIRI v. GADADHAR PRADHAN.

CHITTY J.

to be any good reason for possibly transferring jurisdiction from a Court of one class to a Court of another simply because an appeal from the particular order in question is forbidden. Nor am I prepared to say that the principal Court of original jurisdiction must necessarily refer to a Court of any particular class. It is a Civil or Criminal or Revenue Court, as the case may be.

In this particular case, however, I think that the difficulty may be surmounted. I cannot agree with the learned District Judge when he says that appeals from the decisions of the Collector under the Bengal Tenancy Act *ordinarily* lie to the Commissioner of the Division. A perusal of the Act will show that while in some cases an appeal is allowed to the Commissioner, *e.g.*, section 40 (*5*), in other cases an appeal lies to the Special Judge, *i.e.*, to a Civil Court. If that be so, then under section 195 (*7*) (*b*) the nature of the case has to be considered. Proceedings, under sections 69 and 70, are clearly of a civil nature. The Collector may state a case for the decision of a Civil Court and his order may be enforced as decree of a Civil Court. The Collector's Court may, therefore, be deemed to be subordinate to the Civil Court, *i.e.*, the Court of the District Judge, for the purposes of section 195. This is on the assumption that the words "where no appeal lies" refer only to the case where *all* decisions of a particular Court are not appealable.

If they also refer to a case like the present, where a particular order is not appealable, we arrive at the same result. In that view, it being a matter of a civil nature, the Collector's Court must be regarded as subordinate to the principal Court of original civil jurisdiction, that is, to the Court of the District Judge.

The matter is by no means free from doubt, but this is the conclusion to which I have come after

giving the matter my best consideration. I would accordingly make the Rule absolute, set aside the order of the District Judge, and remand the application of the petitioners to his Court to be disposed of on the merits.

RICHARDSON J. The opening words of clause (7) of section 195 were apparently intended as a general definition or explanation of the term "subordinate" as applied in the previous clauses to a Court.

The sub-clauses of clause (7) were meant, I think, to indicate the result of applying the opening words of the clause to the particular cases dealt with in the sub-clauses. The words "that is to say" at the end of the opening paragraph refer to the preceding words as a whole, with the sense "*which means*," or "*the result being*." The language is not very happy, but that seems to me to be its effect.

This Court has held, in *Raghoobuns Sahoy* v. *Kokil Singh* (1), that a Collector acting in appraisement proceedings under sections 69 and 70 of the Bengal Tenancy Act is a "Court" within the meaning of section 195 of the Criminal Procedure Code. Reference may also be made to *Aldullah Khan* v. *Emperor* (2).

Under clause (5) of section 70 of the Bengal Tenancy Act the Collector's order is final. There is, therefore, no appeal and the case would seem to fall within clause (7), sub-clause (*c*), of section 195. The words "where no appeal lies" in that sub-clause are wide enough to include both a particular case or class of cases in which no appeal lies and a Court from which no appeal lies in any case, such as a Small Cause Court: *Nibaran Chandra Chakrabarty* v. *Akshoy Kumar Banerjee* (3).

(1) (1890) I. L. R. 17 Calc. 872. (2) (1909) I. L. R. 37 Calc. 52.
(3) (1917) 21 C. W. N. 948.

1917

CHANDI CHARAN GIRI v. GADADHAR PRADHAN.

RICHARDSON J.

As to the expression "principal Court of original jurisdiction" in sub-clause (*c*), it has been held, in *Audhia Prasad* v. *Ram Lal* (1), that it means the principal Court of Civil, Criminal or Revenue jurisdiction according to the nature of the case in which the question of sanction arises. I am not aware of any express decision on the point in this Court, and I am not sure that it has not been generally assumed in this province that under the clause as it stands, "the principal Court of original jurisdiction" is in a district the Court of the District Judge who is also in the great majority of cases the Sessions Judge. However that may be, it is unnecessary in the present case to carry the discussion further. I agree that proceedings before the Collector under sections 69 and 70 of the Bengal Tenancy Act are in their nature civil proceedings, and I concur in the order proposed by my learned brother.

E. H. M. *Rule absolute.*

(1) (1911) I. L. R. 34 All. 197.

FULL BENCH.

Before Fletcher, Chatterjea, Teunon, Richardson and Chaudhuri JJ.

MANI LALL SINGH

v.

TRUSTEES FOR THE IMPROVEMENT OF CALCUTTA.*

1917

Aug. 14.

Recoupment—Powers under Calcutta Improvement Act (Beng. V of 1911.) ss. 2, 3, 36, 37, 39, 41, 42 (a), 49 (1), 69, 71 (b), 78, 81, 89, 123 ; Sch, cl. 13—"Betterment"—"Affected"—Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), ss. 63, 68.—Land Acquisition Act (I of 1894), ss. 6, 9, 23 (1) (4), 24 (6), 48.—House and Town Planning Act, 1909 (9 Edw. VII, c. 44), s. 58 (3).—Calcutta Municipal Act (Beng. III of 1899) s. 357 (2).—Bombay City Improvement Act (Bom. IV of 1898), ss. 25, 29—Reference to Full Bench when incompetent.

Per CURIAM (CHATTERJEA J. dissenting). The Calcutta Improvement Act does authorise the Board of Trustees to acquire land compulsorily for purposes of "recoupment," *i.e.*, by selling or otherwise dealing with the land under section 81 or by abandoning the land in consideration of the payment of a sum under section 78.

Trustees for the Improvement of Calcutta v. *Chandra Kanta Ghosh* (1) overruled in so far as it decides to the contrary.

Per CHATTERJEA J. The Act does not authorize compulsory acquisition of land for the purpose of recoupment. The lands are not to be included in the scheme originally for the purpose of thereafter making profits, but if they are properly included in the scheme and subsequently found not to be required, the Board have the power to dispose of such lands.

The question referred to the Full Bench did arise (CHATTERJEA J. *contra*).

Prosonno Coomar Paul Chowdhry v *Koylash Chunder Paul Chowdhry* (2) distinguished.

The preamble does not control the enacting provisions of the Act.

In section 42 (*a*) of Beng. Act V of 1911 "affected" means affected in any way, and not merely "injuriously affected."

* Reference to Full Bench in Appeal from Original Civil No. 91 of 1916.

(1) (1916) I. L. R. 44 Calc. 219. (2) (1867) B. L. R. (F. B.) 759.

1917

MANI LALL SINGH v. TRUSTEES FOR THE IMPROVEMENT OF CALCUTTA.

The Metropolitan Board of Works v. *Owen McCarthy* (1) explained.

The words "by the execution of the scheme" used in section 42 (*a*) simply mean through or owing to the execution of the scheme.

Hammersmith and City Railway Co. v. *Brand* (2) distinguished.

Section 78 does not apply only "to land which was originally required for the execution of the scheme but was subsequently found to be unnecessary."

Per TEUNON J. The area fixed and sanctioned as "the area comprised in the scheme" corresponds with the "lands delineated on the plans" in England.

THE Appeal Court presided over by Sanderson C.J., Woodroffe and Chitty JJ., being in disagreement with the decision of Mookerjee and Cuming JJ. in *Chandra Kanta Ghosh's Case* (3), made this reference to the Full Bench in the appeal preferred by Mani Lall Singh, plaintiff, against the decision of Greaves J.

The Order of Reference was as follows:—

SANDERSON C.J. This case comes before us sitting as a Court for the hearing of appeals from the Original Side of the High Court and it is an appeal from the judgment of Greaves J. which was delivered on the 17th July 1916.

The plaintiff was the owner of certain premises, No. 10, Halliday Street, and the defendants were the Trustees for the Improvement of Calcutta, and Mr. Peterson, the Land Acquisition Collector. The suit was filed for the purpose of obtaining an injunction to restrain the defendants from acquiring the said premises or doing any acts in furtherance thereof.

The land in question, No. 10, Halliday Street, lies to the west side of Halliday Street, the widening of which formed the basis of the scheme No. VII A. There was some discussion during the argument in this Court as to how much of No. 10, Halliday Street, had been taken for the actual street widening.

It was, however, finally agreed by the learned counsel engaged in the appeal that the strips of land to the north and south of No. 10, which had been taken for the purpose of widening Tara Chand Dutt Street and Zakaria Street (which is not named on the plan, but which is the street to the south of No. 10), had been taken under another scheme or other schemes, and that only the portions of No. 10 required for rounding off the corners formed by the junction of these two streets with Halliday

(1) (1874) L. R. 7 H. L. 243. (2) (1868) L. R. 4 H. L. 171.
(3) (1916) I. L. R. 44 Calc. 219.

Street had been taken in scheme VIIA so far as the actual widening of Halliday Street was concerned.

The remainder of No. 10, Halliday Street, the Trustees contend they are entitled to acquire compulsorily under their Improvement Scheme as land "which will, in their opinion, be affected by the execution of the scheme" within the meaning of section 42.

The issue upon which the case was decided was the 5th which ran as follows :—

(5) Are the lands in suit, or any portion thereof required for the purposes of the Act ? Is recoupment one of such purposes ?

Greaves J. decided this issue in favour of the Trustees.

The question depends upon the interpretation of the provisions of the Bengal Act V of 1911, an Act to provide for the Improvement and Expansion of Calcutta.

Last year Mookerjee and Cuming JJ., sitting as a Division Bench on the Appellate Side of the Court, heard an appeal in the case of *The Trustees for the Improvement of Calcutta* v. *Chandra Kanta Ghosh* (1). It was an appeal by the Trustees from a judgment of the Subordinate Judge of the 24-Parganas, and judgment was delivered by the Division Bench on August 22nd, 1916. In that case the question whether the Trustees were entitled to acquire land compulsorily for the purpose of "recoupment" was involved and the learned Judges came to a conclusion as to the construction of the Act contrary to that arrived at by Greaves J. in the case now under appeal.

As at present advised, I agree with the conclusion arrived at by Greaves J. As already stated, the issue included the question "Is recoupment one of such purposes ? It might have been more accurate to say is "recoupment" one of the means authorised by the Act for carrying out the objects of the Act : but it is plain from the judgment that no misunderstanding occurred from the form of the issue.

I agree with Greaves J.'s interpretation of the word "affected" in section 42 and I think the Trustees have power to acquire compulsorily land which, in their opinion, will be affected by the execution of the scheme with a view to selling or otherwise dealing with the same under section 81, or to the payment of a sum of money under section 78.

Consequently, as at present advised, I am unable to agree with the decision in the case of *The Trustees for the Improvement of Calcutta* v. *Chandra Kanta Ghosh* (1) in so far as it decides the contrary, and as my learned brothers Woodroffe and Chitty JJ. have come to the same conclusion, the question of law must be referred to a Full Bench in pursuance of the Rules of this Court.

(1) (1916) I. L. R. 44 Calc. 219 ; 21 C. W. N. 8.

1917

MANI LALL SINGH v. TRUSTEES FOR THE IMPROVEMENT OF CALCUTTA.

SANDERSON C.J.

In view, therefore, of the fact that this appeal must be reargued before a Full Bench, I do not think it necessary to deal in detail with the sections of the Acts or the arguments presented to us. It is sufficient for me to say that I have read the judgments about to be delivered by my learned brothers Woodroffe and Chitty JJ. and that, as at present advised, I agree with the conclusions arrived at by them.

The question to be referred to the Full Bench is whether the case of *The Trustees for the Improvement of Calcutta* v. *Chandra Kanta Ghosh* (1), in so far as it holds that Bengal Act V of 1911 does not authorise the Board of Trustees to acquire land compulsorily for purposes of "recoupment" *i.e.* by selling or otherwise dealing with the land under section 81 or by abandoning the land in consideration of the payment of a sum under section 78, was rightly decided. It was agreed by the learned counsel engaged in Appeal No. 92 of 1916 that it would be covered by the decision in Appeal No. 91 of 1916.

WOODROFFE J. Something has been said as to the supposed novelty and arbitrary character of the principle of recoupment. In England the principle is well known.

"Municipal and other public bodies are sometimes given powers to take land beyond that which is necessary for the actual execution of the proposed works in order that some part at least of the improved value of the adjoining lands may be secured in ease of the burden upon the taxpayers. These lands are said to be authorised to be taken for the purpose of 'recoupment' as the public body is empowered to sell or lease them at what may be an enhanced value". (Laws of England—Halsbury, Vol. VI. page 25).

The principle of recoupment is well known here also and has been apparently provided for in the Bombay City Improvement Act of 1898 and the Calcutta Municipal Act of 1899, section 357 (2), both of which have been in operation for many years.

The latter Act gives the Corporation wider powers than are claimed here for the Trustees.

The question is whether the power of taking land for recoupment has been given in the Calcutta Improvement Act (Beng. V of 1911). Does it appear to be the intention of the Act that the Public body of Trustees are to be allowed to reimburse themselves the cost of improvement? It is possible, though it may not be likely, that what has been given under the Bombay Act and the Calcutta Municipal Act has been withheld here. I do not refer to the Bombay Improvement Act in the question of the construction of the Calcutta Improvement Act but for the purpose of negativing the charge

(1) (1916) I.L.R. 44 Calc. 219; 21 C.W.N. 8.

made against the Act of its being of an unusual arbitrary and oppressive character if it be construed to include the principle of recoupment. That principle is common enough and fair enough. Whether it exists in the provisions of the Act under discussion is another question. We have been told that a frontage tax was negatived. This is not against a power of recoupment having been given. For the former is a wider power applicable to every property fronting the improved area, whereas recoupment gives an option to the Trustees to acquire it or not according to the circumstances. It is obvious that the City cannot be improved except at a cost. It is argued before us that the taxes and contributions provided for by the Act are insufficient to provide the funds necessary for improvement unless the principle of recoupment be allowed. Whilst this is *primâ facie* possible, we must still look to see whether the power has in fact been given. This is a question of construction. Before dealing with the sections, I may dispose of another apparent objection. It is equitable that those whose premises have been benefited by the improvement should contribute to it ; and the application of this principle is subject to scrutiny and sanctions which guard against any misuse of powers.

In my opinion the solution of the question before us depends in the main on the construction of sections 42 and 69. Subsidiarily ss. 68, 78, 81, 122 are of importance. The Preamble states the object of the Act to be to make provision for the improvement and expansion of Calcutta. This is the object of the Act generally stated. It there mentions particular ways in which this general object is given effect to, such as opening up congested areas, altering streets, acquiring lands, and "otherwise as hereinafter appearing." We must distinguish between the direct objects of the Act and the means by which they are to be given effect to. The object is to improve Calcutta. But to improve it money is needed, and the raising of money for that purpose is a means. The Preamble then proceeds to say that it is expedient that a Board of Trustees should be constituted and invested with special powers for carrying out the objects of the Act. One of such powers is the power to acquire land for the execution of the proposed scheme (s. 41). Every improvement scheme must provide for this. Another power (s. 42) is an optional one. Such scheme may provide for the acquisition by the Board of Trustees of "any land in the area comprised in the scheme which will in their opinion be *affected* by the execution of the scheme." The question turns firstly on the meaning of the word "affected." It is obvious that land so affected is different from land required for the execution of the scheme. Thus land may be taken outside the improvement scheme. The improvement brought about by the execution of the latter is the cause of the effect produced on the "affected" and.

1917

MANI LALL SINGH v. TRUSTEES FOR THE IMPROVEMENT OF CALCUTTA.

WOODROFFE J.

It was held in *The Trustees for the Improvement of Calcutta* v. *Chandra Kanta Ghosh* (1) that the word "affected" does not mean "beneficially affected or improved in value"; nor does it mean "prejudicially affected or impaired in value" but signifies "acted upon physically or materially." It is difficult however to conceive of a case in which land is neither beneficially nor prejudicially affected in value. Perhaps what was meant to be said is that it is not sufficient to show that the land is affected in value, but that it is affected physically or materially must also be shown. But I am unable to see any ground which justifies us in reading into the section words which are not there. The Act says nothing about physical or material. It says "affected." This word must be given its plain and natural meaning and that is "affected" howsoever it may be. In my opinion "affected" means affected, and not merely physically affected, affected in value prejudicially or beneficially or so forth. If it is affected in any way, it is "affected." If it is beneficially affected, it is affected and the question arises for what purposes and how the Trustees may acquire it. The next question is whether lands mentioned in s. 42 can be acquired both by agreement under s. 68 and compulsorily under s. 69, or whether, as Mookerjee and Cuming JJ. have held, we are again to interpret a term used in its general sense in a particular sense. It has been held in the judgment cited that there can be no compulsory acquisition in respect of land dealt with in s. 42 (*a*). This conclusion is based on the ground that s. 69 authorises the Board to compulsorily acquire land "for carrying out any of the purposes of this Act." It is then said that as acquisition for the purpose of recoupment is not mentioned in the Preamble, it is not a purpose, or a carrying out of a purpose, of the Act. As I have said, we must distinguish between an improvement and the means by which the improvement is effected. Recoupment is a means. The Preamble is not concerned with the means. It merely states some of the general objects which are to be carried out by the means dealt with in the sections. It mentions acquiring land for certain objects of improvement. It does not mention the acquisition of land that it may be sold at a profit. It mentions the first because that is one of the objects of the Act, it does not specifically mention the second because it is a means, merely stating in a general way that the Trustees are invested with special powers (to be found in the sections) for carrying out the objects of the Act. I asked during the course of the argument whether there is any Act in this country or elsewhere in which recoupment is allowed and in which recoupment is directly mentioned in the Preamble, and none was produced. On the contrary the word recoupment does not appear in any Act. We have further to see what are the express provisions in the body of the

(1) (1916) I. L. R. 44 Calc. 219.

Act. It is and must be admitted that whatever be the meaning of the term "affected" in s. 42, acquisition of land there mentioned is declared to be part of the improvement scheme. How then can it be said that the acquisition of land, which is part of the improvement scheme, is not for the carrying out of a purpose of the Act? As a matter of fact the contention that there cannot be compulsory acquisition under s. 69 of land mentioned in s. 42(*a*) has been abandoned on the hearing before us, it being said that land may be acquired compulsorily or by agreement in respect of the matters mentioned in that section.

The words in s. 69 are not only "for the purposes of this Act" but "for carrying out any of the purposes of this Act", that is, land may be compulsorily acquired both for the ultimate objects of the Act namely, the improvement and expansion of Calcutta, and also as the sanctioned means whereby such improvements can (and as alleged can only) be effected. What then is the object of acquiring land under s 69 combined with s. 42? Even if recoupment can be included in the words "for carrying out of the purposes of the Act," it must be shown that it is in fact so included and that under s. 42 acquisition may be made for such purpose.

As I have already said "affected" includes both beneficially and prejudicially affected in value by the execution of the scheme of improvement. If the land sought to be acquired is likely to be injuriously affected by the execution of the proposed scheme, the land may be acquired at the market price, in which case the prospective loss will, if it occurs, fall on the Trustees. The latter are not bound to take up this or any other affected land. Ordinarily, however, adjoining land will be beneficially affected by the adjoining improvement. In that case, if the Trustees elect to acquire it, they acquire it at the market price and take the chance of prospective profit. They get this profit in one of two ways, either by allowing the owner to apply under s. 78 for exemption of acquisition on payment of a sum to be fixed by the Board, or they may sell the land under s. 81, subject (with certain qualifications) to a right of pre-emption in the owner. Section 78 is of great importance. It is sought to be explained away by saying that it applies to surplus lands, *i.e.*, land which was originally acquired for the execution of the scheme but which was subsequently found not to be so required. The section does not say this, but "which is not required." But let us assume for the moment this construction and see what follows. The section contemplates an application by the owner to the Board requesting that the acquisition should be abandoned in consideration of the payment by him of a sum to be fixed by the Board. Why on the construction put forward by the appellant should the owner pay anything at all? His land is (say) taken by mistake and is found not wanted, and yet he is to be made to pay for the privilege of getting back

1917

MANI LALL SINGH v. TRUSTEES FOR THE IMPROVEMENT OF CALCUTTA.

WOODROFFE J.

his own land which, on a more correct estimate of what was required, should never have been taken from him. Learned counsel for the appellant was unable to say anything more about this than that Government had put this "hardship" on his client and that he had to bear it. It is more reasonable to suppose that instead of imposing unnecessary hardships, the Legislature had in view a useful purpose, namely, recoupment. Moreover the words of s. 78 show that it does not apply to surplus lands under the improvement, because the scheme has not been commenced, and therefore no one is in a position to say what are surplus lands, and because the payment by the owner negatives the idea that the lands here referred to are surplus lands. If they were, there is no reason why the owner should pay for getting back lands which on the hypothesis belong to him.

I agree with Greaves J. that we must read "affected" as meaning "affected" and not as qualified by terms which do not appear in the Act. I agree with him in holding that "affected" means affected in any way, either prejudicially to the owner of the lands, or beneficially affected in the opinion of the Board, that is, enhanced in value by the improvement scheme and that recoupment by compulsory acquisition has been provided for by the Act. There is no question but that the land in suit was "affected" so as to justify its acquisition by the Board, whether we limit the term as the appellant suggests, or give it its full meaning as I think should be done As, however, I am in disagreement with the decision in *Chandra Kanta's Case* (1) in that it holds that Beng. Act V of 1911 does not allow the compulsory acquisition of land for recoupment, I agree that the question, whether it is good law or not, should be referred to a Full Bench in terms of the Chief Justice's judgment.

CHITTY J. This is an appeal from the decree of Greaves J. in a suit brought by Mani Lall Singh against the Trustees for the Improvement of Calcutta and the Land Acquisition Collector to restrain them from acquiring the plaintiff's premises, No. 10, Halliday Street, under the Calcutta Improvement Act (Beng. V of 1911). The learned Judge dismissed the plaintiff's suit finding on Issue (5) that the lands in suit are required for the purposes of the Act and that recoupment is one of such purposes. In the view that he took it was unnecessary to decide the other issues.

I agree with the learned Chief Justice and Woodroffe J. that the decision appealed from is correct, and that this appeal ought to be dismissed. But as this involves disagreement with the decision of a Division Bench of this Court in *The Trustees for the Improvement of Calcutta* v. *Chandra Kanta Ghosh* (1) and consequently a reference to a Full Bench, I will state briefly the reasons for my decision.

(1) (1916) I. L. R. 44 Calc. 219.

The question for determination is whether the principle of recoupment is contemplated by the Calcutta Improvement Act. I should have preferred not to use the word "purposes" in Issue (5) as a distinction might be drawn between "purposes" meaning the "objects" of the Act and "purposes" denoting the means by which those objects are to be attained. The word "purposes" is no doubt wide enough to cover both meanings. Thus the raising of loans by the Board which is specifically provided for by the Act may be said to be a purpose of the Act, though it is strictly one of the means by which the objects of the Act are to be carried out. It may be conceded that the word "recoupment" or indeed any synonymous expression finds no place either in the Preamble or in the body of this Act. Our attention has not been drawn to any Statute or Act in which it does occur, though many such Statutes and Acts contemplate "recoupment," which is a well recognised principle in Town Improvement. So far as the Preamble is concerned, it is expressed in very general terms and the only object or purpose of the Act there specified is "to make provision for the improvement and expansion of Calcutta;" those words are followed by an enumeration of various methods, by which the improvement and expansion are to be effected and the sentence ends "and otherwise" (*i.e.* in other ways) "as hereinafter appearing." These last words, in my opinion, clearly refer back to the various participles preceded and governed by the preposition "by." The second clause provides for the constitution of a Board of Trustees and for investing them with special powers for carrying out the objects of the Act. In my opinion, there is no force in the contention that the principle of recoupment finds no place in the Preamble as a purpose or object of the Act. It is not to be expected that it should. We have to see whether it is one of the special powers with which the Board is invested. To see that we must look into the Act itself. I agree that it must not be a matter of vague implication. It must be found there in provisions as to the meaning of which there can be no doubt.

The most important section is s. 42, which deals with matters which *may* be provided for in improvement schemes, s. 41 having dealt with matters which *must* be provided for. S. 42 runs:—"Any improvement scheme may provide for (*a*) the acquisition by the Board of any land, in the area comprised in the scheme, which will, in their opinion, be affected by the execution of the scheme." I agree with Greaves J. that the decision of this case rests upon the meaning to be given to the word "affected." The arguments of counsel on both sides were exhaustive and proceeded along somewhat devious paths, but all led us back to the simple question, what is the meaning to be placed on the word "affected." The learned Judges, who decided *Chandra Kanta*

1917

MANI LALL SINGH v. TRUSTEES FOR THE IMPROVEMENT OF CALCUTTA.

CHITTY J.

Ghosh's Case (1) expressed their opinion that in s. 42 (*a*) it means neither "beneficially affected or improved in value" nor "prejudicially affected or impaired in value" but signifies "acted upon physically or materially." I am not sure that I understand their meaning. It may be that they mean that it does not necessarily signify affected in value. If they meant that it can have no reference to value I am unable to agree. For the appellant it was argued that it certainly had no reference to value, but to injurious affection by reason of some interference with the owner's rights. No good reason was given for reading the word in so restricted a sense. It is noteworthy that when the Legislature intended so to use it they added the adverb, see s. 23 (1) (*4*) of the Land Acquisition Act, 1894, where the words are "injuriously affecting". I cannot see why the word "affected" should not be given its ordinary and natural meaning, and signify "affected" in any way, beneficially or injuriously, physically or materially, or otherwise howsoever. It seems to me that if land be "affected" at all by the execution of a scheme it must be affected for better or worse. There can be no middle course, for then it would not be affected at all.

If the word be so construed, s. 42(*a*) clearly authorises the Board to include in a scheme the acquisition of any land within the given area which will in their opinion be affected by the execution of the scheme. Whether it will be so affected or not, the Board are the sole Judges, though their scheme is of course dependent on the sanction of the Local Government. I must confess that I was unable to appreciate the force of the argument that s. 42(*a*) does not authorise compulsory acquisition; that that can only be effected under s. 69; that s. 69 only empowers the Board, with the previous sanction of the Local Government, to acquire land under the provisions of the Land Acquisition Act, 1894, for carrying out any of the purposes of this Act; and that the acquisition of land provided for under s. 42(*a*) is not a purpose of the Act. This appears to be the effect of the judgment in *Chandra Kanta Ghosh's Case* (1), though I understood the learned Advocate-General to admit that for some purposes at any rate compulsory powers might be exercised under s 42(*a*). It is difficult to see why a distinction should be drawn between s. 42(*a*) and s. 42(*b*) (*c*) and (*d*) which may certainly be included in purposes of the Act. In my opinion acquisition of land provided for under s. 42(*a*) is just as much a purpose of the Act, though a different one, as the acquisition of land provided for under s. 41 as being in the opinion of the Board required for the execution of a scheme. I understood it to be conceded by the learned counsel for the appellant that the Board could under s. 68 acquire land by purchase or lease for purposes of recoupment. The learned Judges who decided *Chandra Kanta Ghosh's Case* (1) seem to

(1) (1916) I. L. R. 44 Calc. 219.

have been of the same opinion, for they say :—"The section (*i. e.* s. 42) is at best an enabling provision ; it gives no power of compulsory acquisition, though it may possibly authorise the Board to acquire land by private agreement". But s. 42 is quite general in its terms and makes no distinction between the two forms of acquisition, by agreement and compulsory, which are recognised by the Act. An attempt was made to draw a distinction between acquisition by agreement under s. 68 and compulsory acquisition under s. 69 beyond the obvious distinction between agreement and compulsion therein appearing. I do not think that there is any other distinction. The phraseology of the two sections is slightly different, but their meaning is the same. Under s. 68 the Board may make any agreement for the purchase or lease "of any land which they are authorized to acquire". That must mean "authorized to acquire" under this Act. They can therefore under s. 68 only purchase or lease land for carrying out any of the purposes of this Act, which are the words used in s. 69. I am of opinion that the acquisition of land provided for by s. 42(*a*) is for carrying out the purposes of the Act, and that such acquisition, when the scheme has been approved by the Local Government, can be put through under the provisions of either s. 68 or s. 69 as the case may be.

That the Board can acquire land for purpose of recoupment is in my opinion made clear by the provisions of ss. 78 to 81. Section 78 is specially important, as in my opinion it can refer to nothing else. It was argued that it may refer to surplus lands, *i.e.*, to lands which have been included in a scheme but have been found to be unnecessary for its execution. The words of the section, however, are "land . . . . . which is not required for the execution of the scheme", not "which has been found to be unnecessary" for such execution. No satisfactory answer was given by the appellant's counsel to the question put more than once, why, if a man's land has been taken and is to be given back as not required should the unfortunate owner be made to pay to get it back. If the section referred to the abandonment of acquisition of surplus land it would in my opinion be in irreconcileable conflict with s. 48 of the Land Acquisition Act, which must be read as incorporated in this Act. Further the time before which an application under s. 78 must be made, *i.e.*, before the time fixed by the Collector under s. 9 of the Land Acquisition Act, shows that it cannot possibly refer to surplus lands. In *Chandra Kanta Ghosh's Case* (1) it is suggested that s. 78 may come into play where land which was originally intended to be acquired as necessary for the execution of the scheme may turn out to be not actually required by reason of an alteration in the scheme made under s. 50, or by reason of some mistake in the

(1) (1916) I. L. R. 44 Calc. 219.

1917

MANI LALL SINGH v. TRUSTEES FOR THE IMPROVEMENT OF CALCUTTA.

CHITTY J.

original scheme itself. It is difficult to see how any such mistake could arise having regard to the various stages through which a scheme must pass before it is finally sanctioned. Nor is it reasonable to suppose that an elaborate section such as sec. 78 would be framed to meet a contingency which was not and could not be contemplated by the Act. But I cannot see how s. 78 can apply in either of these two contingencies. If a scheme is altered or a mistake discovered, it must be before the land has been acquired. In that case the owner's land is still his own. Section 78 is only to be employed on the owner's application, and the question above referred to is again pertinent, why should he have to pay for retaining his own land which the Board do not require. It was argued that if s. 78 refers to land acquired for purposes of recoupment, then under s. 80 the Board would be able to repeat the process *ad infinitum*. This is clearly not so. That section merely provides that land, for which an exemption fee has been paid under s. 78, is not thereby excluded from a fresh declaration under s. 6 of the Land Acquisition Act.

Lastly, the provision in s. 81 (*2*) (*b*) giving the owner of land a right of pre-emption clearly denotes that the land has been taken for purposes of recoupment and not as required for the execution of a scheme. It provides for the return of land to the owner at a price to be fixed by the Board, when that land has been acquired, while s. 78 provides for such return at an earlier stage of the acquisition proceedings. I do not think that the sections in Chapter VI, Finance Accounts, have much bearing on the question before the Court, but s. 122 provides for the crediting to capital account of all sums that can be received by the Board in respect of the sale of land from whatever source it is derived [see s. 122 (*a*) (*c*) and (*d*)]. I entirely agree with what Woodroffe J. has said with regard to the alleged arbitrary nature of the Act. It appears to be far less arbitrary than the Land Acquisition Act which has been in force, with modifications, for nearly fifty years, or the Calcutta Municipal Act, 1899, with which the people of Calcutta are equally familiar. In this particular case although Greaves J. actually decided Issue (5) only and on that decision dismissed the suit, his judgment shows that he considered the land here in question to be "affected" by the execution of the scheme. [Issue (6).] There is no doubt on the facts, which are not in dispute, that this is so, as two small portions have been cut off for rounding off the corners of Halliday Street and the streets running into it. To this extent the case is distinguishable from *Chandra Kanta Ghosh's Case* (1). The question of law, however, in both cases is the same, and, as we are in disagreement with the decision in that case, I agree that the question should be referred to a Full Bench.

(1) (1916) I. L. R. 44 Calc. 219.

A question was raised whether the Land Acquisition Collector was a necessary or proper party to this suit. In my opinion he was not. In any event, as he is sued in his official capacity, and the allegation in the plaint as amended is made against him in that capacity, the party, if any, to be added was the Secretary of State for India in Council.

The Offg. Advocate-General (*Mr. B. C. Mitter*) and *Mr. S. C. Roy*, for the plaintiff appellant. The referring Judges think that the two cases [*viz.* the one decided by Mookerjee and Cuming JJ. (1), and the other by Greaves J.] are distinguishable, no reference can therefore arise as has been held by a Full Bench in *Prosonno Coomar Paul Chowdhry* v. *Koylash Chunder Paul Chowdhry* (2).

[FLETCHER J. We must hear the reference first as we cannot say now if that difficulty arises.]

Reads and comments on the Preamble and sections 2 (*f*), 36, 37, 38, 40 (*a*), 41, 42, (*a*), 45, 47, 49 (2) (3), 52, 68, 69, 78, 80, 81 of Beng. Act V. of 1911. The Improvement Trust will have to show that they have the power of recoupment by express grant or by implication. They cannot point out express power. Compares the Bombay Act: *Dickson* v. *Pape* (3).

Under the Land Acquisition Act if they abandon the land they have still to pay compensation. "Not required" refers to lands not required *subsequently* and not lands *never* required. Section 42 is subject to section 69. The whole question is—Is recoupment one of the purposes of the Act? Reads the Preamble.

The words "execution of the scheme" must be limited only to the engineering portion of it. Then the compulsory acquisition is limited to the lands physically affected by the scheme: *Gard* v. *Commissioners of Sewers for the City of London* (4). "Affected" means *prejudicially* affected.

(1) (1916) I. L. R. 44 Calc. 219.
(2) (1867) B. L. R. (F. B.) 759.
(3) (1845) 7 Ir. L. R. 107, 123.
(4) (1885) 28 Ch. D. 486, 497.

1917

MANI LALL SINGH v. TRUSTEES FOR THE IMPROVEMENT OF CALCUTTA.

If the land is physically affected and the value goes down the Trust can acquire it, but not if the value has thereby gone up.

[FLETCHER J. I can hardly imagine that the Legislature meant to give the Trust the right to acquire only all prejudicially affected properties and not the beneficially affected ones.]

I do not think it is equitable to take the whole of the improved value of a man's property. Reads Mookerjee J.'s judgment in *Chandra Kanta's Case* (1) and the judgments of Woodroffe and Chitty JJ. in the order of reference.

[FLETCHER J. Exemption fee is only another method of recoupment.]

Section 48 does not give the subject power to compel Government to withdraw. Section 78 (*a*) does not exclude section 41.

Reads Land Acquisition Act, section 3 (*b*).

[TEUNON J. Then you mean to say that the Legislature has used the word "scheme" in two different senses in the same section (s. 42).]

In section 41 the reference is where the value goes up owing to the execution of the scheme itself, while in section 42 (*a*) the value rises owing to user of the improvement.

I have authorities on the point where apart from user the land may be affected on the completion of the engineering works merely under section 68 of the Lands Clauses Act of 1845. [See Chitty's Statutes, Vol. VII, page 350.] Reads page 147 of Cripp's Law of Compensation, 5th Edition, and *In the matter of Penny and the South Eastern Railway Co.* (2).

(1) (1916) I. L. R. 44 Calc. 219; 21 C. W. N. 81.

(2) (1857) 7 El. & Bl. 660, 672.

[CHAUDHURI J. Then you have to replace in section 42 the words "execution of the scheme" by the words "execution of the work."]

Execution of the scheme in section 41 must be taken to be execution of the works which compendiously I call the engineering works.

A statute taking away private rights must be strictly interpreted: *Attorney-General* v. *Metropolitan Railway Co.* (1), *The Long Eaton Recreation Ground Co.* v. *The Midland Railway Co.* (2), *Kirby* v. *School Board of Horngate* (3), *Webb* v. *Manchester and Leeds Railway* (4).

[*Mr. S. R. Das.* The Appeal Court will decide whether the land should be acquired. The Full Bench has to decide whether the Trust have the power to acquire.]

[TEUNON J. Lands coming under section 41 can be compulsorily acquired and the question is whether other lands, *e.g.*, those coming under section 42 (*a*), can be also compulsorily acquired.]

Refers to *Scales* v. *Pickering* (5), Maxwell's Interpretation of Statutes, 5th Edition, page 461; *Dickson* v. *Pape* (6), *Western Counties Railway* v. *Windsor and Annapolis Railway* (7), *Denman Company* v. *Westminster Corporation* (8). The Trust have no power to acquire compulsorily but may by agreement.

[FLETCHER J. It is equally *ultra vires* whether they take by agreement or compulsorily if it is outside their powers.]

Sections 42 and 69 have to be read together. Section 69 is the controlling section. The inclusion of land under section 42 is nothing, but it must be

(1) [1894] 1 Q. B. 384, 392.
(2) [1902] 2 K. B. 574, 581.
(3) [1896] 1 Ch. 437.
(4) (1839) 4 My. & Cr. 116.
(5) (1882) 4 Bing. 448, 452.
(6) (1845) 7 Ir. L. R. 107, 123.
(7) (1882) 7 A. C. 178, 188.
(8) [1906] 1 Ch. 464, 470, 476.

1917

MANI LALL SINGH v. TRUSTEES FOR THE IMPROVEMENT OF CALCUTTA.

affected. Section 4 of the Land Acquisition Act is not excluded from the operation of this Act. In the Calcutta Municipal Act section 357 (2) expressly gives the power of recoupment.

[Gives a list of Acts in which powers of recoupment are expressly given, *viz.*, Beng. Act II of 1888, s. 204; Mad. Act IV of 1884, s. 158; G. G.'s Act XVI of 1903, s. 59. Punjab Act XX of 1891, s. 85. House and Town Planning Act, 1909, s. 58(3).]

The Offg. Standing Counsel (*Mr. S. R. Das*) and *Mr. Langford James*, for the respondents (after dealing with the purpose of the Act) section 45 is a very important section. Section 47 (*2*) provides for full particulars of the scheme of lands proposed to be acquired under sections 41 and 42. Then sections 48 and 49 are important. Sections 68 and 69 merely indicate the manner in which the acquisition is to be carried out, *viz.*, either by agreement under section 68 or by compulsion under section 69 which seem to be taken from the English Lands Clauses Act. Provided it is a proper scheme and sanctioned by Government I have got to carry it out as it becomes one of the objects of the Act.

[CHATTERJEA J. If the Board frames a scheme does it become for one of the purposes of the Act simply because Government sanctions it ?]

No. My friend has conceded that under section 42 land can be included in a scheme to avoid paying damages: then under section 69 I can acquire the land that has been properly included under section 42. Up to section 69 the question of recoupment does not arise.

[FLETCHER J. Admittedly section 69 does include some lands mentioned in section 42, *viz.*, those in clause (*c*), according to Mookerjee J.]

Recoupment comes after section 69. The word "recoupment" is never used expressly in any Act.

Reads section 357 of the Calcutta Municipal Act giving rise to powers of recoupment, though not in so many words : and this power is much more than the power of recoupment under the Improvement Trust.

I have shown that under sections 69 and 42 I can acquire land other than land referred to in section 41, and if I can show that I can deal with that land by selling or allowing the owner to get it back, then clearly there is the power of recoupment. [Reads section 81 before going to section 68.] Therefore I have shown two of the requisites of recoupment, (i) power to purchase, and (ii) power to sell what is not required ; and, lastly, I have to show the 3rd element of recoupment, *viz.*, power to release it to the owner, which is provided for in section 78. It refers to land not originally required. In section 80 the words "subsequently required" are used, not so in section 78, and there is nothing in it militating against its meaning "originally" required. But the power of taking compensation from the owner (section 78) is not either in the Preamble and yet it is allowed. Section 78 contemplates a case before the completion of the acquisition and, therefore, cannot refer to surplus lands which cannot become surplus till after acquisition and construction. Section 78 makes no provision for notice, then how is the owner to know that there is a surplus? unless it means originally not required, which he could easily ascertain when he got the notice to see the maps.

[CHATTERJEA J. If it is capable of both constructions, should we accept that view which compels the owner to pay for retaining his own property ?]

Under section 81 there is the general power to sell or lease. It all comes back to the point if the land is affected. You can deal with it under section 78 or 81.

1917

MANI LALL SINGH v. TRUSTEES FOR THE IMPROVEMENT OF CALCUTTA.

[RICHARDSON J. The word "affected" is used in the Preamble in the sense of affecting adversely.]

In *Metropolitan Board of Works* v. *Owen McCarthy* (1), the question was the meaning of the words "injuriously affected". *Buckinghamshire Co. Ld.*, v. *Hertfordshire Co., Ld.* (2). There is a good deal of difference between "execution of works" and execution of the "scheme". A scheme is one so long as it is a projected undertaking.

[CHATTERJEA J. We will have to go into the facts to see if there was any doubt in the opinion of the referring Judges. In *Julmati Bewa* v. *Shaik Nayan* (3), the Full Bench distinguished on the facts and held that no reference lay to the Full Bench.]

[FLETCHER J. If we send back the case without deciding the law point and one of the referring Judges goes on leave and it is heard by a new Bench who again refer it to a Full Bench, where are we ? Are we to assume that the Judges made a reference in a case knowing full well that no reference could be made to a Full Bench ?]

In *Bikani* v. *Shuk Lal* (4), though Prinsep J. held that the conflicting cases were distinguishable he agreed to the other Judges giving their decision on the point referred as they had heard the matter for so many days. This was a second appeal.

Mr. Langford James then followed *Mr. Das*, with the leave of the Court, (as the Advocate-General objected to the Land-Acquisition Collector entering a separate appearance considering his defence), and briefly discussed all the rulings cited.

(1) (1874) L. R. 7 H. L. 243, 249, 253.
(2) [1899] 1 Q. B. 515, 520.
(3) (1894) I. L. R. 28 Calc. 127 n. 4 C. W. N. 803 note.
(4) (1892) I. L. R. 20 Calc. 116.

The Advocate-General was then heard in reply. He explained and commented upon the cases relied on by the respondent and the appellant.

Cur. adv. vult.

FLETCHER J. The question referred to the Full Bench for determination is as follows :—

"Whether the case of *The Trustees for the Improvement of Calcutta* v. *Chandra Kanta Ghosh* (1) in so far as it holds that Bengal Act V of 1911 does not authorise the Board of Trustees to acquire land compulsorily for purposes of 'recoupment', *i.e.*, by selling or otherwise dealing with the land under section 81 or by abandoning the land in consideration of the payment of a sum under section 78 was rightly decided."

The suit out of which the present reference arises was instituted on the Original Side of this Court by the plaintiff as the owner of the premises known as No. 10, Halliday Street, against the Trustees for the Improvement of Calcutta and the Land Acquisition Collector for the purpose of obtaining an injunction to restrain the defendants from acquiring the said premises or doing any act in furtherance thereof. From the statement given in the opinion of the learned Chief Justice in the order of reference it appears that No. 10, Halliday Street, lies on the west side of Halliday Street, the widening of which formed the basis of a Street Improvement Scheme framed by the Trustees and known as Scheme No. VIIA. There was some discussion during the argument before the referring Judges as to how much of No. 10, Halliday Street, had been taken for the actual street widening. It was, however, finally agreed between the counsel engaged in the appeal that the strips of land to the north and south of No. 10, which had been taken for the purpose

(1) (1916) I. L. R. 44 Calc. 219 ; 21 C. W. N. 8.

1917

MANI LALL SINGH v. TRUSTEES FOR THE IMPROVEMENT OF CALCUTTA.

FLETCHER J.

of widening Tara Chand Dutt Street and Zakaria Street had been taken under another scheme or schemes and that only the portions of No. 10 required for rounding off the corners formed by the junction of these two streets with Halliday Street had been taken in Scheme No. VIIA so far as the actual widening of Halliday Street was concerned. The remainder of No. 10, Halliday Street, the Trustees contend they are entitled to acquire compulsorily under their Improvement Scheme as land, "which will in their opinion be affected by the execution of the scheme". The Trustees admit that the remainder of No. 10, Halliday Street, is being acquired by them for the purpose of what is called "recoupment". Greaves J. dismissed the plaintiff's suit on the 17th of July 1916. Against that judgment the appeal out of which the present reference arises was preferred. On the 22nd of August 1916 Mookerjee and Cuming JJ. sitting as a Division Bench, delivered judgment in the case of *The Trustees for the Improvement of Calcutta* v. *Chandra Kanta Ghosh* (1) in an appeal against a decree of the Subordinate Judge of the 24-Parganas. This is the judgment referred to in the order of reference and in that judgment the learned Judges held that the Trustees had no power under Beng. Act V of 1911 to acquire land compulsorily for the purpose of "recoupment". The appeal against the judgment of Greaves J. came on for hearing before a Bench consisting of Sanderson C. J. and Woodroffe and Chitty JJ., and they not being in accord with the decision of Mookerjee and Cuming JJ. made the present reference.

A point has been raised *in limine* that we ought not to decide the question referred to us as the point does not "arise" for determination within the meaning of the Rules of this Court in relation to references

(1) (1916) I. L. R. 44 Calc. 219 ; 21 C. W. N. 8.

to a Full Bench. The foundation for this argument is certain observations made by the learned referring Judges. There is no substance in this argument. The learned referring Judges state that the question as to the correctness of the decision of Mookerjee and Cuming JJ., does "arise" in the appeal in which this reference is made and it is obvious it does arise with regard to the whole of No. 10, Halliday Street, except the small portions taken for rounding off the corners of the road. Further, this reference arises out of a regular appeal. No case has been cited to us of a reference to a Full Bench in a regular appeal where the Full Bench has refused to answer the question referred. The case of *Prosonno Coomar Paul Chowdhry* v. *Koylash Chunder Paul Chowdhry* (1) which was relied on by the Advocate-General when looked at is not an authority for his proposition. For it appears that in that case it was only the minority of the Bench that was of opinion that the question ought not to be answered, the majority holding on the other hand that the question referred must be answered. It is also to be observed that on the rules relating to references to a Full Bench this case might in certain circumstances be heard by a Division Bench other than that which made the present reference, and in that event if we were to decline to answer the question that other Bench might send the case back on a fresh order of reference. I am clearly of opinion that we must determine the question referred to us.

Now the question referred must be determined on the construction of the provisions of Beng. Act V of 1911. But before considering the sections of the Act, I should like to make clear what is understood by the terms "recoupment" and "betterment".

(1) (1867) B. L. R. (F. B.) 759 ; 8 W. R. 428.

1917

MANI LALL SINGH v. TRUSTEES FOR THE IMPROVEMENT OF CALCUTTA.

FLETCHER J.

This is best shown by the report in 1894 of a Select Committee of the House of Lords on Town Improvement (Betterment). That Committee had before them "witnesses who have had experience in the actual working of betterment charges in various forms and they have also taken the evidence of other experienced witnesses and of gentlemen who have written on the subject". They reported [paragraph 3 (*1*) of the report].—"The principle of betterment, in other words, the principle that persons whose property has clearly been increased in market value by an improvement effected by local authorities should specially contribute to the cost of the improvement is not in itself unjust and such persons can equitably be required to do so. But the effect of a public work in raising the value of neighbouring lands is shown by experience to be uncertain. Whether in any particular case it is possible for a valuer to pronounce that such an effect has been produced by the completion of any public work is a point upon which the evidence of eminent valuers differs greatly".

[Paragraph 3(*10*)].—"The committee have received evidence upon what has been called 'recoupment', that is to say, powers given to a Municipal or other public body to take land beyond what is necessary for the actual execution of the work so that some part at least of the improved value may be secured by the improving public body in ease of the burden on the rate-payers. Some evidence was given by persons who had actual experience of the operations of such a system, the general effect of which was that it had not proved successful, but the committee are not satisfied that it has ever been tried under circumstances calculated to make it successful inasmuch as no sufficient power has ever yet been given to local authorities to

become possessed of the improved properties without buying out all the trade interests, a course which is inevitably attended with wasteful and extravagant expenditure."

I have set out these portions of the report of the Select Committee as I feel, with all respect, that the learned Judges who decided the case of *The Trustees for the Improvement of Calcutta* v. *Chandra Kanta Ghosh* (1) have not kept clearly in view what is the object of "recoupment" and "betterment". The vesting of a local authority with power to acquire land for the purpose of "recoupment" cannot, I think, be described at the present day as "vesting the Board with arbitrary and unlimited powers of interference with private rights".

The question, therefore, as to whether or not a particular statute authorizes "recoupment" or "betterment" must be determined solely on a consideration of the terms of the statute, and, if it does so authorize, it must also be determined whether compulsory powers of acquisition have been conferred for carrying into effect such purposes.

Mookerjee and Cuming JJ. in their judgment proceed in the first instance to consider the Preamble of Act V of 1911 and observe that "recoupment" is not mentioned as one of the purposes of the Act. But one would *not* expect to find it there. The Preamble usually only mentions the general object and intention of the Legislature in passing the enactment; further, it is well established that the Preamble cannot restrict the enacting part of an Act though it may be referred to for the purpose of solving an ambiguity.

Mookerjee and Cuming JJ. in their judgment place considerable stress on the first paragraph in the Preamble. Their reading of that paragraph is not,

(1) (1916) I. L. R. 44 Calc. 219 ; 21 C. W. N. 8.

1917

MANI LALL SINGH v. TRUSTEES FOR THE IMPROVEMENT OF CALCUTTA.

FLETCHER J.

however, the literal and grammatical reading of it. The construction those learned Judges put on the paragraph was that the objects of the Act are—

A.—The improvement and expansion of Calcutta.

B.—The re-housing of the working classes displaced by schemes.

The learned Judges, however, remark that "the words 'and otherwise hereinafter appearing' at the end of the paragraph are by no means easy to construe with what precedes". The plain reading of the paragraph is that the object is the improvement and expansion of Calcutta by means specified "and otherwise as hereinafter appearing". The Preamble, I think, affords us little assistance in the present case, only its terms cannot be used as in any way negativing the power of recoupment claimed.

Turning then to the sections of the Act which I think are material:

"Improvement scheme" is defined by section 2 as meaning a general improvement scheme or a street scheme, or both.

"The duty" of carrying out the provisions of the Act, subject to the conditions and limitations contained therein, is by section 3 vested in a Board, to be called "The Trustees for the Improvement of Calcutta".

Chapter III of the Act is headed "Improvement Schemes and Re-housing Schemes." Sections 36 and 37 deal with general improvement schemes.

Then comes an important section 39 in the following terms:—"Whenever the Board are of opinion that, for the purpose of (*a*) providing building-sites, or (*b*) remedying defective ventilation, or (*c*) creating new, or improving existing, means of communication and facilities for traffic, or (*d*) affording better facilities for conservancy, it is expedient to lay out new

streets or to alter existing streets (including bridges, causeways and culverts), the Board may pass a resolution to that effect, and shall then proceed to frame a street scheme for such area as they may think fit".

Section 41 provides that "every improvement scheme shall provide for—(*a*) the acquisition by the Board of any land, in the area comprised in the scheme, which will, in their opinion, be required for the execution of the scheme".

Section 42 enacts that "any improvement scheme may provide for—(*a*) the acquisition by the Board of any land, in the area comprised in the scheme, which will, in their opinion, be affected by the execution of the scheme."

Now it is quite clear that section 42 (*a*) authorises the acquisition of land lying within the improvement area but which is not required for the execution of the scheme. The question is to what extent, and that must largely depend on what is the meaning of the word "affected."

Mookerjee and Cuming JJ. held that "affected" means in the section "acted upon physically or materially" and that the power of acquisition given by section 42 (*a*) applied only where "in respect of those lands there will be a physical interference with a right, public or private, which the owner is entitled to exercise in connection therewith."

This definition is clearly taken from the judgments delivered in the House of Lords in the case of *The Metropolitan Board of Works* v. *Owen McCarthy* (1). That decision, however, was on the meaning of the word "injuriously affected" as used in section 68 of the Lands Clauses Consolidation Act, 1845, which is a very special section. A different meaning has been placed on the same words "injuriously affected" occurring in

(1) (1874) L. R. 7 H. L. 243.

1917

MANI LALL SINGH v. TRUSTEES FOR THE IMPROVEMENT OF CALCUTTA.

FLETCHER J.

section 63 of the Lands Clauses Consolidation Act, 1845. It has also been held on more than one occasion that the decisions on section 68 of the Lands Clauses Consolidation Act, 1845, are of little or no assistance in construing the words "injuriously affected" in sections of Acts of Parliament not *in pari materia* with section 68 of the Lands Clauses Act.

The decision of Mookerjee and Cuming JJ., comes to this that in section 42 (*a*) of Beng. Act V of 1911 "affected" means "injuriously affected." With this result I am unable to agree. I agree with the opinion of Woodroffe J., in his opinion in making this reference, that "affected" in section 42 (*a*) means affected in any way.

Next, it was argued that, as section 42 (*a*) only authorises the Board to acquire land which is affected "by the execution of the scheme", the Board has only power to acquire land affected during the execution and not by the completion of the scheme. The argument is based on the decision in the case of *Hammersmith and City Railway Co.* v. *Brand* (1) which turned on the meaning of the words "execution of the works" used in section 68 of the Lands Clauses Act, 1845. That case, however, is of no assistance in construing section 42 (*a*) of Bengal Act V of 1911. The words "by the execution of the scheme" used in section 42 (*a*) simply mean through or owing to the execution of the scheme.

Then, if that be so, for what purpose can the Board acquire land which is not required for the execution of the scheme under the provisions of section 42 (*a*)? The purpose is given in section 81 which authorises the Board to retain or to let on hire, lease, sell or exchange any land vested in or acquired by them under the Act. That the Board have

(1) (1868) L. R. 4 H. L. 171.

power to acquire land under section 42 (*a*) for the purpose of "recoupment" is strongly supported by the terms of section 78 of the Act. The view that Mookerjee and Cuming JJ. took of that section, *viz.*, that it applied to land which was originally required for the execution of the scheme but was subsequently found to be unnecessary, cannot be supported. In such a case why should the owner pay money to the Board to get back his land?

The meaning of the section is perfectly clear. Under the scheme of the Act primarily the method provided for the Board securing for the public a portion of the "unearned increment" is by the means of recoupment. The Legislature did not, however, absolutely shut out the principle of "betterment" but provided by section 78 that where land is about to be taken for "recoupment" then on the application of the owner he and the Board may, if they agree as to the amount, deal with such owner's land on the principle of "betterment" instead. Section 78, I think, says that in as clear terms as is possible.

Lastly, Mookerjee and Cuming JJ. were of opinion that even if the Board had power to acquire land for the purposes of "recoupment" they had no power to acquire such lands compulsorily. The fact that the Board have power to acquire land for the purpose of "recoupment" does not necessarily mean that they have power to acquire it otherwise than by agreement. The powers of compulsory acquisition are set out in section 69 of the Act which provides that the Board may with the previous sanction of the Local Government acquire land under the provisions of the Land Acquisition Act, 1894, for carrying out any of the purposes of the Act.

Under the provisions of section 49 (1) of the Act the Board are bound forthwith to execute a scheme

1917

MANI LALL SINGH v. TRUSTEES FOR THE IMPROVEMENT OF CALCUTTA.

FLETCHER J.

sanctioned and notified by the Local Government. Surely one of the main purposes of the Act is the expansion and improvement of Calcutta by the execution of improvement schemes framed by the Board and sanctioned by the Local Government. With regard to land comprised in such schemes, the acquisition of which by the Board the scheme provides for, the Board with the sanction of the Local Government can exercise their compulsory powers of acquisition under section 69 of the Act. In my opinion we ought to answer the question referred to us in the manner following, namely :—That the case of *The Trustees for the Improvement of Calcutta* v. *Chandra Kanta Ghosh* (1), in so far as it holds that Beng. Act V of 1911 does not authorise the Board of Trustees to acquire land compulsorily for purposes of "recoupment," *i.e.*, by selling or otherwise dealing with the land under section 81 or by abandoning the land in consideration of the payment of a sum under section 78 was not rightly decided.

N. R. CHATTERJEA J. The question referred to the Full Bench is "whether the case of *The Trustees for the Improvement of Calcutta* v. *Chandra Kanta Ghosh* (1) in so far as it holds that Beng. Act V of 1911 does not authorise the Board of Trustees to acquire land compulsorily for purposes of "recoupment, *i.e.*, by selling or otherwise dealing with the land under section 81 or by abandoning the land in consideration of the payment of a sum under section 78 was rightly decided."

It is contended on behalf of the appellant that upon the statement of the case in the referring order this reference does not arise.

(1) (1916) I. L. R. 44 Calc. 219 ; 21 C. W. N. 8.

The contention of the Trustees (as it appears from the statement of the case) is that they are entitled to acquire the land compulsorily under their improvement scheme as land "which will, in their opinion, be affected by the execution of the scheme" within the meaning of section 42, and the learned Judges who made this reference are also of opinion that it is so "affected."

Woodroffe J. observes* "There is no question but that the land in suit was 'affected' so as to justify its acquisition by the Board, whether we limit the term as the appellant suggests, or give it its full meaning as I think should be done. As, however, I am in disagreement with the decision in *The Trustees for the Improvement of Calcutta* v. *Chandra Kanta Ghosh* (1), in that it holds that Beng. Act V of 1911 does not allow the compulsory acquisition of land for recoupment, I agree that the question, whether it is good law or not, should be referred to a Full Bench in terms of the Chief Justice's judgment."

Chitty J. observes† "There is no doubt on the facts, which are not in dispute, that this is so," (*viz.*, that the land here in question is "affected" by the execution of the scheme) "as two small portions have been cut off for rounding off the corners of Halliday Street and the streets running into it. To this extent the case is distinguishable from *Chandra Kanta Ghosh's Case* (1). The question of law, however, in both cases is the same, and, as we are in disagreement with the decision in that case, I agree that the question should be referred to a Full Bench."

In *Chandra Kanta Ghosh's Case* (1) the learned Judges were of opinion that the word "affected" in section 42 means "physically or materially affected," and the land proposed to be acquired in that case not

* See *ante* p. 350.

† See *ante* p. 354.

(1) (1916) I. L. R. 44 Calc. 219.

1917

MANI LALL SINGH v. TRUSTEES FOR THE IMPROVEMENT OF CALCUTTA.

CHATTERJEA J.

having been physically affected was held not to have been "affected" within the meaning of section 42(*a*). They had, therefore, to consider whether the Board have power to acquire land *for the purposes of recoupment* by including it in a scheme under section 42 (*a*) or under the other provisions of the Act. In the present case the learned Judges are of opinion that the land is "affected" within the meaning of section 42 (*a*) of the Act even according to the interpretation placed upon the section in *Chandra Kanta's Case* (1). It is true the Board in the present case also stated that the land was included in the scheme for the purpose of recoupment, but they also stated that in their opinion, the land was affected by the execution of the scheme.

If the land is properly included in a scheme under section 42(*a*) as land "affected" by the execution of the scheme, it can be compulsorily acquired under section 69 of the Act, and it is immaterial what object the Board have in acquiring the land. No doubt in *Chandra Kanta's Case* (1), the learned Judges were of opinion that section 42 (*a*) does not authorise compulsory acquisition of land but in their view the land in that case was not "affected". The question whether land can be compulsorily acquired in a case where the land is properly included in a scheme under section 42 (*a*) did not therefore arise in that case. In the present case the learned Judges being of opinion that the land is "affected" even according to the view taken of the word in that case, I think the question whether the Act authorises the Board to acquire land compulsorily *for purposes of recoupment* does not arise in the present case.

There is no doubt that in many cases Full Benches declined to answer the questions referred to them

(1) (1916) I. L. R. 44 Calc. 219.

on the ground that the reference did not arise. A number of earlier cases on the point are referred to in the case of *Prosonno Coomar Paul Chowdhry* v. *Koylash Chunder Paul Chowdhry* (1) which was referred to the Full Bench by Peacock C. J., and Loch J. Three of the learned Judges (Peacock C.J, Glover and Jackson JJ.) were of opinion that the questions did arise. The other two Judges (Macpherson and Kemp JJ.), "following the practice acted upon frequently by Full Bench Courts," held that no answer should be given to the first question referred on the ground that it did not arise. Jackson J. (although he was of opinion that the question did arise) entirely agreed with Macpherson J. that the Full Bench, if, looking into the case as far as is necessary for the purpose, it should find that the point does not arise, ought to desist from answering it and pointed out the serious inconvenience arising from following the opposite course. Peacock C.J. and Glover J. were of a different opinion and the former even went so far as to hold that "if uniformity of decision in the High Courts is desirable as it undoubtedly is, one Division Bench ought not to decide contrary to a *dictum* of another Division Bench without referring the question to a Full Bench." The opinion of Peacock C.J., however, has not been followed by Full Benches, and Full Benches have in many cases declined to answer the question referred where in their opinion it did not arise. For instance, see *Joolmutty Bewa* v. *Kali Prasanna Roy* (2), *Balaram* v. *Mangta Das* (3) and *Kumar Profulla Krishna Deb* v. *Nosibannessa Bibi* (4). It is said that the rule does not apply to regular appeals as the case may go to a Division Bench other than the Bench which referred

(1) (1867) B.L.R. (F. B.) 759 ; 8 W.R. 428.
(2) (1893) I. L. R. 28 Calc. 127 note.
(3) (1907) I. L. R. 34 Calc. 941.
(4) (1916) 24 C. L. J. 331.

1917

MANI LALL SINGH v. TRUSTEES FOR THE IMPROVEMENT OF CALCUTTA.

CHATTERJEA J.

it, and specially where, as in the present case, the Division Bench has not come to a decision on questions of fact, but may apply to second appeals where the whole case is referred to the Full Bench for decision. But the reference in *Prosonno Coomar Paul's Case* (1) arose out of a regular appeal, and in the present case, upon the statement of the case in the referring order itself, *Chandra Kanta Ghosh's Case* (2) is distinguishable. I am accordingly of opinion that the question of correctness of that case does not arise. As, however, the majority of the Full Bench are of a different opinion, I proceed to state my views upon the question referred to us.

The first paragraph of the Preamble to the Act (Beng. V of 1911) states the objects of the Act. It says— "Whereas it is expedient to make provision for" (i) "the improvement and expansion of Calcutta by opening up congested areas, laying out or altering streets, providing open spaces for purposes of ventilation or recreation, demolishing or constructing buildings, acquiring land for the said purposes and" (ii) "for the re-housing of persons of the poorer and working classes displaced by the execution of improvement schemes."

It is contended on behalf of the Trustees that in order to read it in this way there should be a comma after the words "said purposes." But as pointed out by the Judicial Committee in the case of *The Maharani of Burdwan* v. *Krishna Kamini Dasi* (3) "it is an error to rely on punctuation in construing Acts of the Legislature." The omission of a comma, I think, does not affect the reading of the Preamble in the way stated above. Then follow the words "and otherwise as hereinafter appearing." It is contended on behalf

(1) (1867) B. L. R. (F. B.) 759.
(2) (1916) I. L. R. 44 Calc. 219.
(3) (1887) I. L. R. 14 Calc. 365, 372; L. R. 14 I. A. 20.

of the respondent that the words should be read with the words "to make provision." On the other hand, it is said that these words mean "by other means and methods as hereinafter appearing." It is difficult to construe the words with reference to the earlier portion of the Preamble, but whatever they may mean they have no reference to the acquisition of land, because acquisition of land has already been provided for in the earlier part and is restricted to the "said purposes", *i.e.*, the purposes expressly mentioned therein. It is to be observed that the acquisition of land for the purposes of recoupment is not one of the purposes of the Act enumerated in the Preamble. The second paragraph states that it is expedient that a Board of Trustees should be constituted and vested with special powers for carrying out the objects of the Act. The fourth paragraph recites that the sanction of the Governor General had been obtained to the enactment of the provisions of Chapter V relating to taxation. Before dealing with the important sections which have any bearing upon the question referred I will briefly refer to the provisions of the Act.

Section 2 gives the definitions of words used in the Act and it is only necessary to notice clause (*f*) which says that "Improvement scheme" means a general improvement scheme or a street scheme or both. Chapter II relates to the constitution of the Board, conduct of business and the appointment of their officers and servants and such other matters. Chapter III deals with improvement schemes and re-housing schemes and comprises sections 36 to 67. Section 36 provides for the framing of a general improvement scheme and section 39 provides for the framing of a street scheme. Section 40 mentions the matters to be considered when framing improvement schemes in respect of any area, and which include

1917

MANI LALL SINGH v. TRUSTEES FOR THE IMPROVEMENT OF CALCUTTA.

CHATTERJEA J.

"the nature and the conditions of neighbouring areas and of Calcutta as a whole." Sections 41 and 42 lay down matters which *must* and *may* be provided for respectively in improvement schemes. Section 43 provides for the preparation by the Board of a notice of the scheme and of the boundaries of the area comprised therein, and for the publication of such notice, and section 45 provides for the service of notices on persons whose land is proposed to be acquired in execution of the scheme. Section 47 provides for the application by the Board to the Local Government for the sanction of the scheme and for the particulars to accompany the application. Section 48 provides for the sanction of the scheme by the Government; and section 49(1) provides for the notification by the Local Government of the sanction, and sub-section (*2*) lays down that the publication of a notification shall be conclusive evidence that the scheme has been duly framed and sanctioned. Section 50 provides for alteration of the scheme after it has been sanctioned.

Chapter IV, which consists of sections 68 to 81, deals with "Acquisition and disposal of land." Section 68 provides for the acquisition by the Board of land by agreement, and section 69 provides for compulsory acquisition of land by the Board for carrying out any of the purposes of the Act. Section 70 and the following section provide for the constitution of a tribunal for the purposes of acquiring land. Section 78 provides for the abandonment of land the acquisition of which has been sanctioned, but which is not required for the execution of the scheme.

Chapter V relates to taxation which comprises duty on transfers, of property, terminal tax on passengers and customs duty on jute.

Chapter VI deals with finance. Section 88 provides for municipal contributions, and section 89 gives

power to the Board to borrow money. Sections 122 and 123 respectively deal with the crediting of moneys to the capital account and with the application of moneys credited to the capital account.

The most important sections to be considered in connection with the question referred to us are sections 41, 42, 68, 69, 78, 80 and 81.

Section 41 (*a*) says that every improvement scheme *shall* provide for the acquisition by the Board of any land which will, in their opinion, be required for the scheme, whereas section 42 (*a*) lays down that any improvement scheme *may* provide for the acquisition by the Board of any land, in the area comprised in the scheme, which will, in their opinion, be "affected by the execution of the scheme."

There is no question that the land "required for the scheme" means the land which is actually required for what may be called the engineering or construction works, for instance, in a street scheme the land necessary for laying out the street. The main controversy has centred round the expression "affected" in section 42 (*a*). In *Chandra Kanta Ghosh's Case* (1), it was held that the word "affected" in section 42 means "neither beneficially affected or improved in value, nor prejudicially affected or impaired in value, but signifies acted upon physically or materially." On the other hand in the opinion of the referring Judges it means affected in any way and not merely "physically affected," "affected in value prejudicially or beneficially or so forth." The Dictionary meaning of the word is "acted upon" and it is capable of a very large meaning. It may be conceded that it may mean affected beneficially as well as prejudicially although it is generally used in the latter sense. But the meaning to be attached to the word would vary

(1) (1916) I. L. R. 44 Calc. 219.

1917

MANI LALL SINGH v. TRUSTEES FOR THE IMPROVEMENT OF CALCUTTA.

CHATTERJEA J.

according to the context, and the question is in what sense the word has been used in section 42 (*a*), and whether it has any reference to *value* of the land. According to the contention of the respondents the object of inclusion of land under section 42 (*a*) is recoupment. But the acquisition of land prejudicially affected cannot be any means of recoupment. The word therefore could not have been used in the sense of "depreciated in value." It is true that the Board is not bound to include any land in the scheme under section 42 (*a*); it is merely optional with them to do so, and therefore they would not include any land depreciated in value within the scheme. But what I mean to say is that the object being recoupment, the word "affected" could not have been used in the sense of "prejudicially affected in value." Then does the word refer to land beneficially affected—or improved in value? When an improvement scheme is framed with respect to any area the whole of it would be beneficially affected in value by the scheme. For instance, in a street scheme the properties fronting a street would be more beneficially affected in value, the other portions of the area may be less beneficially affected in value by it; but every portion of it will be more or less beneficially affected in value. If therefore the word "affected" in section 42 (*a*) has reference to value, the whole of the area may be acquired by the Board under section 42 (*a*). But if that was the intention of the Legislature, I do not see the necessity of the words "which will in their opinion be affected by the execution of the scheme," because every portion of the area is affected more or less. In that case after providing in section 41 (*a*) that the improvement scheme *shall* provide for the acquisition by the Board of any land in the area comprised in the scheme which will in their opinion "be required for the

scheme," it would have been sufficient to say in section 42 (*a*) that any improvement scheme "*may* provide for the acquisition by the Board of any land in the area comprised in the scheme" and the words "which will in their opinion be affected by the scheme" would be wholly unnecessary. Then again, if the word "affected" has any reference to value and if recoupment is the object of inclusion of land not actually required for the scheme (the inclusion of lands prejudicially affected in value being out of the question), it is difficult to see why the ambiguous word "affected" was used instead of the words "increased in value" which would have expressed the intention which, according to the respondent, the Legislature had in framing the section. It is not as if such an expression is never used in similar statutes. Section 58, sub-section (3) of the House and Town Planning, etc., Act, 1909 (9 Edw. VII Chap. 44), provides "where by the making of any town planning scheme any property *is increased in value*, the responsible authority . . . shall be entitled to recover from any person whose property is so *increased in value* one half of the amount of that increase."

In this connection it may be pointed out that under section 24 of the Land Acquisition Act, the Court, in determining the amount of compensation to be awarded for land acquired under that Act, shall not take into its consideration "any increase to the value of the other land of the person interested likely to accrue from the use to which the land acquired will be put". That gives the benefit of any rise in the value of other lands of the person, whose land is taken up, to him, and section 24 has not been repealed by the Calcutta Improvement Act.

I am accordingly of opinion that the word "affected" has no reference to value in section 42 (*a*).

1917

MANI LALL SINGH v. TRUSTEES FOR THE IMPROVEMENT OF CALCUTTA.

CHATTERJEA J.

The only sense therefore in which the word could have been used is in the sense of "acted upon physically or materially." That is one of the recognised meanings as given in the Oxford Dictionary, and in the case of *The Metropolitan Board of Works* v. *McCarthy* (1) the House of Lords in construing the words "injuriously affected" held that "where by the construction of works there is a physical interference with any right, public or private, which the owners or occupiers of property are by law entitled to make use of, in connection with such property, apart from the uses to which any particular owner or occupier might put it, there is a title to compensation, if by reason of such interference, the property as a property is lessened in value." It is true that the question in that case was as to the meaning of the words "injuriously affected" in section 68 of the Lands Clauses Consolidation Act, 1845, under which the plaintiff claimed compensation, and not merely "affected" as in the present case. But if the word "affected" does not signify physical interference the mere addition of the word "injuriously" would not do so, because when land is depreciated in value, it may also be said to be "injuriously affected." The words, no doubt, had to be construed with reference to the provisions of that particular statute, and it was held that in order to found a claim to compensation under that section for an interest in land "injuriously affected," there must be an injury affecting the house or land itself in which the person claiming compensation has an interest, and that a mere personal inconvenience, obstruction and damage to a man's trade or the good-will of his business will not be sufficient. It was further held that the property must be lessened in value by the physical interference, but that was

(1) (1874) L. R. 7 H. L. 243.

because they had to deal with the question of compensation claimable under the section in respect of land *injuriously* affected.

The passage quoted above, however, shows that the word "affected" may appropriately be used with reference to physical interference with rights. In fact, it is not disputed on behalf of the respondent that it may mean "physically affected", their contention being that it means "affected" in any way, whether "physically affected" or "affected in value." I think, however, that although the value may also be affected by physical interference, the word as stated above has no reference to value in section 42 (*a*). That being so, the word must in section 42 (*a*) mean "physically or materially affected." It is true that those words are not in the section, but the word "affected" must be construed having regard to the context.

Land may be physically "affected" by the execution of a scheme in a variety of ways, for instance, a building near the improvement may suffer from the construction of works by subsidence, or by having easements affected or by reason of "severance," in which case the Board may have to pay heavy compensation, and it may be more advantageous to the Board to acquire the building or land affected, and then to dispose of it, rather than pay compensation for the injurious affection, although such building or land is not required for the execution of the scheme under section 41 (*a*). Section 49 of the Land Acquisition Act provides that a part only of any house or building cannot be acquired, if the owner desires that the whole of it should be acquired. Now if only a part of a house or building is necessary for the execution of a scheme, the remaining portion of it may be affected by the execution of the scheme. The

1917

MANI LALL SINGH v. TRUSTEES FOR THE IMPROVEMENT OF CALCUTTA.

CHATTERJEA, J.

latter portion cannot come under section 41 (*a*) and must therefore come under section 42 (*a*); and if there were no provisions such as are contained in section 42 (*a*), the whole elaborate procedure prescribed in Chapter III of the Act would have to be repeated for acquisition of such land because although no fresh declaration is necessary, a fresh sanction of the Government would be required. The word "affected" may properly apply to all such cases as are stated above, and I do not see how it can be said that "physically or materially affected" is not a natural meaning of the word.

It is contended on behalf of the appellant that even if "affected" means "beneficially affected in *value*," the expression used in section 42 (*a*) being not merely "affected" but "affected *by the execution of the scheme*," the affection must be due to the actual execution of the scheme itself, and not due to any use to which the land is put after the execution of the scheme. In section 41 (*a*) the words "land required for the scheme" admittedly means land required for the work actually to be done on it, *i.e.*, the land required for engineering or construction works. The land affected by the execution of the scheme in section 42 (*a*) must therefore mean land affected by the engineering or construction work itself, and I think it must be shown that in any particular case the rise in value is due to the execution of the scheme itself, and apart from the use to which it might be put.

I think it unnecessary, however, to consider the point further, or to discuss the cases decided under the Lands Clauses Consolidation Act and the Railway Clauses Consolidation Acts which were cited before us, because I am of opinion that the word "affected" has no reference to value in section 42 (*a*).

Section 42 (*a*) does not by itself give the Board power to acquire land. The power of acquisition is given by sections 68 and 69. Section 68 provides that "the Board may enter into an agreement with any person for the purchase or leasing by the Board from such person of any land which the Board are authorised to acquire, or any interest in such land:" and section 69 provides that "the Board may, with the previous sanction of the Local Government, acquire land under the provisions of the Land Acquisition Act, 1894, for carrying out any of the *purposes of this Act*." No practical difficulty arises in a case of purchase by agreement under section 68, because although in such a case also the acquisition must be one which the Board are authorised to make, the transaction being by consent of parties, there is no one to raise the question. But where the land is to be compulsorily acquired, it must be shown that it is to be acquired for "any of the purposes of the Act." It is true that the scheme submitted to Government for sanction would include both lands under sections 41 (*a*) and 42 (*a*), but the mere fact that the land is included in the scheme framed under section 42 (*a*) will not justify its acquisition, unless it be for the purposes of the Act, otherwise it would have been sufficient to say in section 69 that the Board may acquire any land sanctioned by the Government without the addition of the words "for carrying out any of the purposes of the Act." So section 42 (*a*) alone does not help us in deciding the question whether land can be acquired for recoupment. The purposes of the Act are mentioned in the Preamble. Recoupment is not stated to be one of the purposes of the Act. It is said that recoupment, being only one of the means by which the purposes are to be accomplished, does not find a place in the Preamble. That

1917

MANI LALL SINGH v. TRUSTEES FOR THE IMPROVEMENT OF CALCUTTA.

CHATTERJEA J.

may be so, but when the Preamble states "acquiring land for the said purposes" and the purposes such as "opening up congested areas," etc., are expressly mentioned in the Preamble, the power given to the Board under section 69 to acquire land for "any of the purposes of the Act" must be taken to have reference to the "purposes" enumerated in the Preamble and those only.

It is also contended on behalf of the respondent that "purposes" include the means by which the object is to be attained, and recoupment being one of the means, is one of the purposes of the Act. But I am unable to hold that "means" which are the instruments for accomplishing the purposes of the Act are "purposes" of the Act.

If, however, the body of the Act gives power to acquire land for the purposes of recoupment *expressly* or by *necessary implication* then the mere fact that the Preamble does not state it would not matter. There is no express provision in the Act that any land can be acquired for the purposes of recoupment. Then, is the power given by necessary implication? It is said that the words "for carrying out" any of the purposes of the Act in section 69 imply such power, but I think that "carrying out" merely means "giving effect to." The Board have the power to acquire land for giving effect to the purposes of the Act mentioned in the Preamble such as "opening congested areas" and the other purposes enumerated therein, as no other purpose is mentioned in any other part of the Act. Section 80 shows that if any land in respect of which an agreement has been executed, or payment has been accepted under section 78, is subsequently required for any of the purposes of the Act, it may be acquired under a fresh declaration. Now if recoupment is one of the purposes of the Act, the same

land which has already paid what may be called the exemption fee, may again be included in a scheme for the purposes of recoupment and the process may be repeated any number of times—a result which I think could never have been contemplated.

In *Chandra Kanta Ghosh's Case* (1) the learned Judges held that section 42 does not authorise compulsory acquisition of land "though it may possibly authorise the Board to acquire land by private agreement." As stated above, section 42 (*a*) by itself does not confer the power of acquisition of any land, either compulsory or by agreement. The question whether any land included in the scheme under section 42 (*a*) can be compulsorily acquired under section 69, depends upon whether the acquisition of the land is for "carrying out any of the purposes of the Act." Section 42 (*a*) may be satisfied merely by voluntary acquisition. But if any land is "physically" or "materially affected" by the execution of a scheme, the acquisition of such land would be necessary for carrying out the "purposes of the Act." In such a case the Board have the power to compulsorily acquire such land under section 69 as well as to acquire it by agreement under section 68, and I do not see any reason why in such a case land mentioned in section 42 (*a*) cannot be compulsorily acquired.

Section 49 provides that whenever the Local Government sanctions an improvement scheme it shall announce the fact by notification and the Board shall forthwith proceed to execute the same, and that the publication of the notification shall be conclusive evidence that the scheme has been duly framed and sanctioned. It is contended on behalf of the respondents that a scheme submitted for sanction under section 47 includes lands proposed to be acquired

(1) (1916) I. L. R. 44 Calc. 219.

1917

MANI LALL SINGH v. TRUSTEES FOR THE IMPROVEMENT OF CALCUTTA.

CHATTERJEA J.

under section 42(*a*), and when it is sanctioned under section 48 it becomes a statutory duty of the Board to execute it. But that assumes that the scheme has been sanctioned for the purposes of the Act and that the Act contemplates acquisition of land for the purpose of recoupment. If acquisition of land for the purpose of selling it and making profit therefrom is a purpose of the Act, the carrying out of a scheme sanctioned by the Government would no doubt be carrying out a purpose of the Act, but that is begging the very question to be decided. The second clause of section 49 says that the publication of the notification shall be conclusive evidence that the scheme has been framed and sanctioned. But the mere fact that it is sanctioned does not show that the land is required for carrying out any of the purposes of the Act.

The next important section is section 78. That section relates to the abandonment of land, the acquisition of which has been sanctioned but which is not required for the execution of the scheme, and great reliance is placed upon it as showing that the Board have the power of recoupment. That section provides that "in any case in which the Local Government has sanctioned the acquisition of land, in any area comprised in an improvement scheme, which is not required for the execution of the scheme, the owner of the land, or any person having an interest therein, may make an application to the Board, requesting that the acquisition of the land should be abandoned in consideration of the payment by him of a sum to be fixed by the Board in that behalf."

It is contended on behalf of the appellant that it contemplates land which was originally considered necessary for the execution of the scheme, but which is subsequently found not to be so required. On the other hand, the respondents contend that it refers to

land which was not and was never required for the scheme, but which was included in the scheme for the purposes of recoupment. The words used in the section, however, are "which *is* not required for the execution of the scheme," and that implies that the lands were originally considered necessary for the execution of the scheme, but were subsequently found not to be so required. The words, I think, do not refer to the time when the sanction of Government is applied for, but to the time when the abandonment is applied for by the owner under section 78. A comparison of the words used in sections 41 (*a*) and 42 (*a*) with those used in section 78 indicates this. When framing a scheme under section 41 (*a*) or 42 (*a*) it is a mere opinion of the Board that the land "will be required" or "will be affected." It is only in the further stages of the proceedings that it may turn out that the land *is not* required, and it is then that the application under section 78 is made. The section may apply to a case where a scheme having been sanctioned was subsequently altered under section 50. It may also apply to a case where a certain quantity of land was entered in the scheme as being necessary for the execution of the scheme, but it was subsequently found that a lesser quantity would suffice for the purpose. It is contended that it cannot apply to surplus lands, because surplus lands can be ascertained only after acquisition. But a scheme may be altered after sanction and before acquisition, and there may be cases where surplus lands are ascertained after sanction and before acquisition. The strongest argument against the appellant's contention is that if it is well founded the owner has to pay for retaining his own land "which on a more correct estimate of what was required should never have been taken from him." It is to be borne in mind, however, that the

1917

MANI LALL SINGH v. TRUSTEES FOR THE IMPROVEMENT OF CALCUTTA.

CHATTERJEA J.

Board cannot of their own motion abandon the acquisition of any land. It is only upon the application of the owner that the Board can do so. If no application is made for abandonment under section 78, the Board must acquire the land (except as provided in section 48 of the Land Acquisition Act), and section 81 provides that "the Board may retain, or may let on hire, lease, sell, exchange or otherwise dispose of, any land vested in or acquired by them under this Act."

The Board are to admit the application under section 78 if it reaches them before the time fixed by the Collector under section 9 of the Land Acquisition Act for making claims in reference to the land. It would appear from sub-section (*3*) of section 78 that the section has application after the Collector has started proceedings under the Land Acquisition Act. It says that if the Board decide to admit any such application, they shall forthwith inform the Collector; and the Collector shall thereupon stay for a period of three months all *further proceedings* for the acquisition of land. It appears therefore that the proceedings under section 78 take place after the declaration and before the notice under section 9 of the Land Acquisition Act. But as soon as the declaration is made under section 6 of that Act, the power to acquire the land is absolute, whether the land is required or not. The Government can withdraw from the acquisition, but it cannot do so except on payment of compensation under section 48 of the Land Acquisition Act, and section 48 (*a*) of the Improvement Act provides for payment of compensation for delay if the Collector does not make an award within two years of the declaration under section 6 of the Land Acquisition Act. The Board therefore incur a liability, as soon as a declaration is made, under section 6 of the Land Acquisition Act.

On the other hand as soon as a declaration is made, the owner has no longer any right to get back the land and cannot compel the Government to give it up. The land having been made the subject of declaration, the value of it may go up, in some cases may go up enormously. It is not reasonable that the Board should incur a liability to the owner for damages, and at the same time be deprived of the benefit of the rise in value of the land, and in these circumstances it is not inequitable that the owner should pay for the retention of the land. He is under no compulsion to apply to the Board for abandoning the acquisition, but if he chooses to do so, he must pay the sum fixed by the Board for the abandonment of the land which, if he had not applied for its retention, the Board might have acquired and sold to others at a profit. This, however, does not show that the lands may be deliberately included in the scheme for the express purposes of recoupment as contended on behalf of the respondents. The lands are not to be included in the scheme originally for the purpose of thereafter making profit, but if included because considered necessary for the scheme, and it is subsequently found not to be required either by reason of an alteration of the scheme, or by reason of less lands being actually required, the Board have the power to dispose of such lands. The provisions of section 81 apply to such lands. That section gives to the Board the power to dispose of lands *vested* in or *acquired* by them under the Act and that of course means properly acquired by them. It is contended that cases of alteration of scheme or mistake in estimate must be rare, and that it is not likely that the elaborate provisions of section 78 should have been framed for such stray cases, and that under the circumstances the construction contended for on behalf of the respondent should be preferred.

1917

MANI LALL SINGH v. TRUSTEES FOR THE IMPROVEMENT OF CALCUTTA.

CHATTERJEA J.

But the Act contemplates alteration of schemes and section 50 makes express provisions for it, and there may be some cases of wrong estimates. Once it is held that such cases may come under the section, it cannot be said that the section gives the power of acquisition of lands for the purposes of recoupment by necessary implication. It appears that Greaves J., by whom the case was originally tried, did not attach much importance to the arguments founded upon section 78, and he was of opinion that the words of the section would be satisfied by applying them to "surplus lands," and that he should be loath to spell out of these words so large a power as is claimed by the defendant. I agree with what Greaves J. says on this point. The question is not whether the power of acquisition of land for the purposes of recoupment can possibly be spelt out of the section, but whether the power is given by *necessary* implication. If the construction put forward on behalf of the appellant can reasonably be placed on the section, in other words if the words of the section can be satisfied by reference to lands subsequently found unnecessary, it cannot be said that the power of recoupment is given by *necessary implication.* As pointed out by Bell J. in *Dickson* v. *Pape* (1) "a necessary implication is not guess, not probability, but an inference which by no reasonable intendment can be otherwise, it is a state of things excluding any reasonable conclusion but the one." The powers claimed by the Trustees are very large; according to their contention they may acquire any land within the area for which an improvement scheme is framed, for the purpose of recoupment. Now, when there are two possible constructions of the words defining their powers, if on the one construction the Board would have almost

(1) (1845) 7 Ir. L. R. 107, 123.

unlimited power of interference with private rights, and on the other they are not clothed with such power, but with a power more convenient and limited, the latter construction should be preferred.

It is not and cannot be disputed that the power of recoupment may be given to Municipal and other bodies. As stated in Halsbury's Laws of England, Vol. VI, page 25, "Municipal and other public bodies are sometimes given powers to take land beyond that which is necessary for the actual execution of the proposed works in order that some part at least of the improved value of the adjoining lands may be secured in ease of the burden upon the ratepayers. These lands are said to be authorised to be taken for the purpose of 'recoupment' as the public body is empowered to sell or lease them out at what may be an enhanced value [*Galloway* v. *The Mayor and Commonalty of London* (1); *Quinton* v. *Corporation of Bristol* (2)]. . . . . If the Act clearly authorises the land to be taken for the actual works only, a local authority or other public body will be restrained from taking more than is actually necessary for such works [*Donaldson* v. *South Shields Corporation* (3)], but if it appears that it is the intention of the Act that the public body are to be allowed to reimburse themselves, they will then be at liberty to take all the lands delineated on the plans [*Galloway* v. *The Mayor, etc., of London* (1); *Quinton* v. *Corporation of Bristol* (2)]. On the other hand, when local authorities are authorised to take lands from time to time for specific works, such as street widening, and the land is not specified in the Act, they cannot, in order by re-sale to reduce the expense to the ratepayers, take more than is *bonâ*

(1) (1866) L. R. 1 H. L. 34. (2) (1874) L. R. 17 Eq. 524.
(3) (1898) 68 L J. Ch. 102.

1917

MANI LALL SINGH v. TRUSTEES FOR THE IMPROVEMENT OF CALCUTTA.

CHATTERJEA J.

fide necessary for the purpose, [*J. L. Denman & Co., Ld.*, v. *Westminster Corporation* (1) and *Fernley* v. *Limehouse Board of Works* (2)]." It will serve no useful purpose to discuss these cases which turn upon the provisions of the particular statutes with which they deal. I will only notice two cases upon which the parties respectively placed some reliance. On behalf of the respondent reliance was placed on the case of *Galloway* v. *The Mayor and Commonalty of London*(3), where it was pointed out that there is a distinction between power given to a body of adventurers for a certain purpose (as for example the formation of a railway) and powers given to an existing public body such as the Corporation of a City of making public improvements in its city and that the powers thus entrusted to it for such a purpose will not be subject, as in the other case, to a strict restrictive construction. But even such public bodies authorised to make large improvements cannot exercise their powers except for the purposes of the Act. It is to be borne in mind that in England statutes authorising public bodies to acquire land compulsorily generally contain a schedule or a plan or a book of reference defining the land to be acquired. In the case of *Gard* v. *The Commissioners of Sewers of the City of London* (4) Kay J., in construing the statute 57, Geo. III, C. xxix, which empowered a public body to alter and widen the streets, and for that purpose to compulsorily acquire lands and houses which might be adjudged by them to prevent or obstruct such widening or alteration, after stating the argument advanced that the Commissioners (in that case) were a body like the Corporation of London in the case of *Galloway* v. *The Mayor, etc., of London* (3)

(1) [1906] 1 Ch. 464.
(2) (1898) 68 L. J. Ch. 344.
(3) (1866) L. R. 1 H. L. 34.
(4) (1883) L. R. 28 Ch. D. 486, 496, 497.

"armed with powers for the purpose of making improvements in this great city, and that it is a part of the scheme of the Act that they may take, in carrying it out at some time, more land than is actually wanted for the physical purpose of widening the streets, and therefore the Court will deal very liberally with them—will give a most wide interpretation to, and will not interfere with their powers—although it may appear that they are taking more lands than will be wanted for the actual widening, and intending, all along, to sell the portion which they will not use for that purpose, and by the sale to raise money to enable them to carry out the purposes of the Act," observed as follows :—" Then I was referred to the 96th section of the Act, to shew that they have the power, subject to the right of pre-emption, of selling any land which they may have taken and which they really do not want for the purpose of widening the streets, and that the moneys which they obtain from such a sale may be used for the purposes of the Act, and it was urged that this is within the case of *Gallo way* v. *The Mayor and Commonalty of London* (1). Now there is a very wide distinction between this and the case of *Galloway* v. *Corporation of London* (1). In that case the lands which were to be taken were all put in a schedule to the Act: they were actually defined by boundaries and quantities, and the words of the Act were that they might take all those lands, which not only showed the extent to which they were to go, but placed a limit, within the four corners of the Act, upon the quantity of land which they were to take. There is nothing of that kind in this statute. It contains no schedule. There is no limit whatever upon the lands which are to be taken, save such as is comprised in the words which I have read, and that makes

(1) (1866) L. R. 1 H. L. 34.

1917

MANI LALL SINGH v. TRUSTEES FOR THE IMPROVEMENT OF CALCUTTA.

CHATTERJEA J.

an enormous difference between the two cases. Suppose, for example, that the Commissioners were to desire to widen one of the main thoroughfares of London . . . . .—or so much as came within their jurisdiction —and to say "We will take lands on both sides of the street," if the argument be right, they could adjudge that every house and every piece of vacant land on both sides of the street obstructed it, however wide these might be, and they might take the whole of every such house and piece of land. Suppose the street passed the *Bank of England*, they might, if they thought fit, take the whole of the Bank, although they might only want two feet of it for the purpose of widening the street. Suppose there was a large frontage of land, a quarter of an acre, in the city of London vacant, with no building upon it, then although they might only want a yard of such frontage they might if they chose take the whole, according to the argument. That would be giving a very much greater power to the Commissioners having the control of pavements than was given in *Galloway* v. *The Mayor and Commonalty of London* (1); and that is a distinction between the two cases, which would make me hesitate very much indeed before I could hold that under the Acts such bodies as the Commissioners are entitled to such power as that." In the Court of Appeal(1) (which affirmed the decision of Kay J.), Baggallay, L.J., referring to *Galloway's Case* (1), observed: "The circumstances in that case, as has been pointed out in *Thomas* v. *Daw* (2), were very different. In that case the Corporation were not merely authorized to take what they might adjudge to be necessary for the purpose of improvement they were about to effect, but lands were specified in the

(1) (1866) L. R. 1 H. L. 34. (2) (1866) L. R. 2 Ch. App. 1.

schedule to the Act of Parliament, and power to deal with them was given by the Act to the Corporation." I have quoted the observations of Kay J. at length, for the purpose of showing that there is a wide distinction between a statute in which the Legislature has expressly defined the lands to be acquired, and a case like the present where the lands are not defined in the Act and a public body have been given power to acquire land only for the purposes of the Act. The scheme when framed under section 42 (*a*) of the Calcutta Improvement Act would define the area out of which the acquisition is to be made, but the area is not defined by the statute itself. The Board may frame a scheme of improvement either under section 36 or section 39 for such area as they may think fit, and if the respondent's contention is correct, they can include any land within the scheme they think proper with the deliberate object of recoupment and then acquire any such land for the purposes of recoupment. That is a power wholly different from the power to acquire land for the purpose of recoupment within an area defined by the statute itself.

It is said that the principle of recoupment is well known in this country, and reference is made to the Calcutta Municipal Act and Bombay City Improvement Act, though the word "recoupment" is not expressly used in any Act. But whether any statute gives the power or not depends upon the construction of the particular statute, and the intention must be gathered from the language used in the particular statute. With regard to the Acts referred to above, however, it may be observed, that in the first place it does not appear that the question whether the public body concerned has the power of acquiring land for the purpose of recoupment has ever been raised or decided. In the next place the words used in those

1917

MANI LALL SINGH v. TRUSTEES FOR THE IMPROVEMENT OF CALCUTTA.

CHATTERJEA J.

Acts are different from those used in the Calcutta Improvement Act.

Section 357 (*1*) of the Calcutta Municipal Act (Beng. III of 1898) after providing for the acquisition of any land "required for the purpose of widening, extending or otherwise improving any public street and the buildings, if any, standing upon such land" provides in sub-section (*2*) for the acquisition of any land in *addition* to those mentioned in sub-section (*1*) outside the proposed street alignment with the building thereupon, which the Corporation may in the exercise of any of the powers conferred by sub-section (*1*) consider it expedient to acquire. It is to be noted that whereas under section 42 (*a*) of the Calcutta Improvement Act, in order to enable the Board to acquire any land in the area comprised in the scheme, it is necessary that the land must in their opinion be "*affected by the execution of the scheme*," section 357 (*2*) of the Calcutta Municipal Act empowers the Corporation to acquire any land outside the street alignment which it may consider *expedient* to do so, in exercise of the powers conferred by sub-section (*1*) of that section. Section 25 of the Bombay City Improvement Act (Bom. Act IV of 1898) provides that an improvement scheme which may exclude any part of the area in respect of which an official representation is made, or include any neighbouring land if the Board are of opinion that such exclusion or inclusion *is expedient*, shall, within the limits of the area comprised in the scheme, provide for the acquisition of any land which will in the opinion of the Board be *necessary for or affected by the execution* of the scheme. Section 29 provides that on receipt of the sanction of the Government a declaration is to be notified under the signature of a Secretary to Government stating the fact of such sanction, and that the land proposed to be

acquired by the Board for the purposes of the scheme is required for a public purpose, and that the declaration *shall be conclusive evidence* that the *land is needed for a public purpose* and the Board shall thereupon proceed to execute the scheme. The publication of a notification under section 49 of the Calcutta Improvement Act, however, is conclusive evidence only of the fact that the scheme has been duly framed and sanctioned. However that may be, as I have said already, one Act cannot be construed with reference to the provisions of another Act. The question whether the Calcutta Improvement Act gives power to the Board of compulsory acquisition of land for the purposes of recoupment must be determined with reference to the provisions of that Act.

The Calcutta Municipal Act gives wider powers to the Corporation than those given to the Board by the Calcutta Improvement Act. But it may be pointed out that when land is acquired under the Calcutta Municipal Act, the market value of the land or building under section 557 (*d*) of that Act shall, until the contrary is shown, be presumed for the purposes of the clause *first* of sub-section (*1*) of section 23, to be twenty-five times the annual value of the property as entered in the assessment book prescribed by the Act. And when land is acquired under the Land Acquisition Act the owner is entitled to the 15 per cent. statutory compensation in addition to the market value of the land. Under the Calcutta Improvement Act there is no such presumption, nor is the owner entitled to any statutory compensation.

Chapters V and VI of the Act relate to taxation and finance. In addition to the duty on transfers of property, terminal tax on passengers and Customs duty on jute, there is provision for Municipal contributions, and section 89 gives the Board the power to borrow

1917

MANI LALL SINGH v. TRUSTEES FOR THE IMPROVEMENT OF CALCUTTA.

CHATTERJEA J.

any sum necessary for the purpose of meeting expenditure debitable to the capital account under section 123. Section 123 lays down that the money credited to the capital account shall be held by the Board in trust and shall be applied to (among others) meeting all costs of framing and executing improvement schemes and re-housing schemes, and meeting the cost of acquiring land for carrying out any of the purposes of the Act. If the acquisition of land for the purpose of recoupment was intended to be one of the means for carrying out the objects of the Act (and the intention must be determined as *expressed* in the provisions of the Act) the Legislature would have expressed it in clear language so as to put it beyond reasonable doubt, as it has done in the case of other means for carrying out the objects of the Act, and would not have left it to be spelt out of section 42(*a*) or 78 of the Act.

The order of reference to the Full Bench refers also to section 81 of the Act. But that section comes into operation only when land has been acquired by, or vested in, the Board. Where land has been acquired by or vested in the Board properly, or in cases properly coming under section 78, the Board have the power of disposal of such lands, or of requiring the owner to pay for abandonment as the case may be, and disposal of every land vested in the Board may not result in profit. But as already explained that is very different from including in a scheme land (which is neither required for nor affected by the scheme) with the deliberate object of acquiring it for the purpose of recoupment.

I have the misfortune to differ from the majority of the Full Bench, but after an anxious consideration of the provisions of the Act, I am unable to hold that the case of *The Trustees for the Improvement of*

Calcutta v. *Chandra Kanta Ghosh* (1) in so far as it holds that the Act (Beng. V of 1911) does not authorise the Board of Trustees to acquire lands compulsorily *for the purpose of recoupment* was wrongly decided; and I would accordingly answer the question referred in the affirmative.

TEUNON J. This reference arises out of the proposed acquisition by the Board of Trustees for the Improvement of Calcutta of a plot of vacant land being premises known as No. 10, Halliday Street.

It appears that the Board of Trustees have decided to make or open out in the northern part of Calcutta a main thoroughfare spoken of as a central avenue, and that the making of this avenue involves the widening of the street known as Halliday Street. With this chief object in view, and in pursuance of a resolution in terms of section 39, clause (c) of the Calcutta Improvement Act, 1911, the Trustees have framed their Scheme No. VII A, in the manner contemplated in sections 39 to 42 of the Act The scheme has been duly published as required by sections 43 to 45 and, on submission in accordance with the provisions of section 47, has been sanctioned by the Government under section 48.

The scheme thus sanctioned comprises a considerable area and provides, *inter alia*, for the acquisition of a part of such area including premises No. 10. The said premises are said to measure 2 bighas 15 cottahs and though a small portion is required for the widening of the street, *i.e.*, for rounding off the corners at the junction of Halliday Street with two side streets, the major portion avowedly has been included within the area of acquisition under the provisions of section 42 (*a*), as land which, in the opinion of the Board, will

(1) (1916) I. L R. 44 Calc. 219.

1917

MANI LALL SINGH v. TRUSTEES FOR THE IMPROVEMENT OF CALCUTTA.

TEUNON J.

be affected by the execution of the scheme. In other words, in the opinion of the Board, by the widening of Halliday Street, this land will be enhanced in value, and in so far as it is not within the street alignment and so required, it is to be taken for purposes of recoupment.

The owner, one Mani Lall Singh, accordingly brought his suit substantially to restrain the Trustees from acquiring the said major portion falling outside the street alignment on the ground that acquisition for purposes of recoupment is not within their statutory powers. On the 17th day of July 1916 the question thus arising was decided against the plaintiff by Greaves J., sitting in the exercise of the Original Civil Jurisdiction of this Court.

Meanwhile, in the case of the *Trustees for the Improvement of Calcutta* v. *Chandra Kanta Ghosh* (1), the same question had arisen in respect of premises No. 40-10, Chaulpati Road, which lie within the district of the 24-Parganas and outside the limits of the Original Civil Jurisdiction. In that case the question was decided in favour of the plaintiff and against the Trustees by the Subordinate Judge of the 24-Parganas, and, on appeal by the Trustees, on the 22nd of August 1916, his decision was affirmed by a Division Bench.

Against the decision of Greaves J. the plaintiff Mani Lall Singh next appealed, and the learned Judges constituting the Bench before which this appeal came, finding themselves in disagreement with the decision of the 22nd August 1916, have consequently referred to the Full Bench the question which may be stated in effect as follows, namely, "whether the case of the *Trustees for the Improvement of Calcutta* v. *Chandra Kanta Ghosh* (1), in so far as it holds that Bengal Act V of 1911 does not authorise the Board of Trustees to

(1) (1916) I. L. R. 44 Calc. 219.

acquire land compulsorily for purposes of recoupment, was rightly decided."

In the case of the *Trustees for the Improvement of Calcutta* v. *Chandra Kanta Ghosh* (1), the premises No. 40-10, Chaulpati Road, lay wholly outside and some 55 feet away from the street alignment there proposed. In the case of Mani Lall Singh, as I have already pointed out, a small portion of the area or premises proposed to be acquired falls within, and the major portion without, the proposed street alignment. At the hearing of this reference it was consequently suggested, though as it appeared to me, in a half-hearted manner, that on the facts the two cases could be distinguished and that the reference to the Full Bench was therefore unnecessary and incompetent. To this contention I am unable to accede. As regards the major portion of the premises in question, the portion falling outside the proposed street alignment, the Division Bench making the reference found themselves, as I understand, unable to distinguish between the case before them and the case of *Chandra Kanta Ghosh* (1). In my opinion, in so far as that area is concerned, the two cases cannot be distinguished and the question referred should therefore be answered.

The decision of that question depends, in my opinion, on the construction to be placed on section 42, clause (*a*) of the Act, which reads thus—"Any improvement scheme may provide for (*a*) the acquisition by the Board of any land, in the area comprised in the scheme, which will, in their opinion, be affected by the execution of the scheme."

The argument before us has been somewhat discursive, but the considerations advanced in support of the plaintiff's contention that section 42, clause (*a*)

(1) (1916) I. L. R. 44 Calc. 219.

1917

MANI LALL SINGH v. TRUSTEES FOR THE IMPROVEMENT OF CALCUTTA.

TEUNON J.

should not be construed as authorising acquisition for purposes of recoupment, may be summarised as follows :—In the Preamble, and again in Chapter V, dealing with taxation, there is no reference or no specific reference to recoupment. In other Acts in which acquisition by local authorities for purposes of recoupment is authorised for instance, in the Calcutta Municipal Act, 1899, section 357, and in the recent Town Planning Act of the Imperial Parliament, we find express reference to "expediency" or to "increase in value." In as much as the Act is one which gives large powers of interference with private rights, its provisions should be strictly construed. In construing the words [section 42 (*a*)] "affected by the execution of the scheme" we should be guided by the decisions of the Courts in England under the Lands Clauses Consolidation Act in the case of lands "injuriously affected by the execution" of the authorised "works" or "undertaking," and we should further have regard to the analogy afforded by the sixth clause of section 24 of the Land Acquisition Act I of 1894. Lastly, it is contended that section 78 of the Improvement Act, regarded by the referring Judges as embodying a distinct reference to, and therefore as of special importance in construing section 42 (*a*), should itself be construed as referring merely to lands which, for some or other cause, for example, by reason of some mistake or some alteration in the original scheme, have become "superfluous" or surplus lands.

For these reasons, it is contended we should construe the word "affected" as having no reference to value but as implying some physical interference resulting in either a decrease or an increase in the rights which the owner of the land in question is entitled to exercise in connection therewith. In this

view we should, therefore, hold that recoupment is not a purpose for which, under section 69 of the Act, the Board may, with the sanction of the Local Government, acquire land under the provisions of the Land Acquisition Act.

To the argument based on the omissions from the Chapter on Taxation and from the Preamble, on the use of other language in other enactments, and, on the sixth clause of section 24 of the Land Acquisition Act, I am unable to attach importance. A provision for recoupment is not a form of taxation. In the Preamble the main object of the Act, namely, "the making of provision for the improvement and expansion of Calcutta" is set out. There is no exhaustive enumeration of the ways or methods in which, far less of the means whereby, the end in view is to be attained, and it cannot be said by reference to the Preamble alone that power to secure to the Trustees the improved value, or part of the improved value, resulting from their expenditure of public funds, is not one of "the special powers" with which they may be invested. In any case the operative provisions of the Act are not to be controlled or restricted by the Preamble.

No doubt when in an enactment authorising public bodies to execute improvements and to acquire the lands necessary for the same we find that they are further authorised to take such additional lands as "they may think it expedient to take," or such lands as in their opinion will be "increased in value" by the improvements made, it becomes clear that in such enactment the Legislature has recognised and embodied the principle of recoupment. But no stereotyped form for the conferment of this power of acquisition for purposes of reimbursemen thas yet been evolved, and the question is whether by the language used in

1917

MANI LALL SINGH v. TRUSTEES FOR THE IMPROVEMENT OF CALCUTTA.

TEUNON J.

the enactment under consideration that power has been given.

Similarly the analogy afforded by the sixth clause of section 24 of the Land Acquisition Act does not appear to me to assist the appellant. In the Improvement Act the plans, schedules and books of reference required by English statutes, are replaced by a description of the area "comprised in the scheme." Such scheme is framed in the first instance by the Board after consideration of objections and representations, is submitted with plans and full particulars to Government for approval, and is finally sanctioned, if approved, by Government. The area fixed and sanctioned as "the area comprised in the scheme" may be said to correspond with the "lands delineated on the plans" in England. The Board must provide [section 41 (*a*)] for the acquisition of all lands falling within that area and "required for the actual execution of the scheme," that is, I take it, for the construction of the proposed improvements. As in England the promoters may, if so empowered by the Act, take all "the lands delineated on the plans," so here the Board [section 42(*a*)] may take the whole or any part of the remaining area comprised in the scheme if, in their opinion, such whole or part "will be affected by the execution of the scheme," that is, by the proposed improvements when executed or completed. No doubt the sixth clause of section 24 of the Land Acquisition Act has not been modified by the provisions of this Act, but the clause embodies merely a principle of valuation, and the "other land" referred to therein must, in cases such as the present, be land outside the area comprised in the scheme or land which, though within that area, the Board does not propose to acquire.

It is then said that in Acts authorising the taking of private property doubtful provisions should be

construed in favour of the landowner. But the cases of *Galloway* v. *The Mayor and Commonalty of London* (1), *Quinton* v. *Corporation of Bristol* (2) and *Rolls* v. *School Board for London* (3) would seem to be authority for holding that to public bodies acting for the public benefit the principle above enunciated is not to be applied so strictly as in the case of companies seeking their private profit. However that may be, the question, to use the language of Chief Justice Erle, is, what meaning and intention "is conveyed to the rational mind" by the words used in the present Act.

The argument based on the Lands Clauses Consolidation Act and on the meaning placed by the Courts in England on the words "injuriously affected by the execution of the work" in the said Act is possibly the one on which, on behalf of the appellant, has been laid most stress.

The argument is twofold. In the first place it is said that the words "by the execution of the scheme" restrict the Board of Trustees and the Court to the effect produced by the acquisition of the lands required for the actual execution of the work, that is, in this case, for the construction of the widened thoroughfare. We may not, it is said, take into consideration the use to which the land so required is to be put. This branch of the argument appears to be based partly on the analogy afforded by the fifth and sixth clauses of section 24 of the Land Acquisition Act and partly on the English decisions which, in the case of persons from whom no land is taken, limit compensation to damage caused by the construction of the undertaking, and exclude damage arising from the subsequent authorised user. This branch of the argument is, in

(1) (1866) L. R. 1 H. L. 34. (2) (1874) L. R. 17 Eq. 524.
(3) (1884) 27 Ch. D. 639.

1917

MANI LALL SINGH v. TRUSTEES FOR THE IMPROVEMENT OF CALCUTTA.

TEUNON J.

my opinion, fallacious. We are here dealing with an improvement scheme as a whole, and the prospective user, or the possibility of such user, is of the essence of the matter.

The argument in its second branch is, that we should give to the word "affected", in section 42, clause (*a*), the meaning given in the Lands Clauses Consolidation Act, and in the decisions thereunder, to the words "injuriously affected."

I am not of opinion that the said Act and the cases cited are of any assistance to us. The Act and the cases, in so far as we are now concerned with them, deal only with damage sustained by reason of "injurious affection"; and the title to and assessment of compensation in respect thereof. A distinction is drawn between cases in which other lands of the claimant have been taken and cases in which no other lands of the same owner have been acquired. The rules or principles laid down as applicable in the two cases are not in all respects the same. No such distinction appears to be drawn in section 42 of the present Act. Moreover, the word used is "affected", not "injuriously affected." The omission of the word "injuriously" cannot be supposed to be otherwise than of intention. Indeed, the words "injuriously affected" were before the framers of this Act in the Land Acquisition Act under which proceedings for compulsory acquisition have to be taken. I am, therefore, unable to assign to the word "affected" now under consideration the meaning or meanings that have been placed upon the words "injuriously affected" in the Lands Clauses Consolidation Act.

Indeed, as has been affirmed by the learned Judges who decided the case of *Chandra Kanta Ghosh* (1) the word "affected," as used in section 42, clause (*a*),

(1) (1916) I. L. R. 44 Calc. 219.

of the Improvement Act, is not a "word of art" to which a technical meaning must be given. It must be construed in its ordinary acceptation, and with reference to the context. When that is recognised, its interpretation in the present case does not to my mind present much difficulty. Land upon which an effect of some sort or kind has been produced, whether for the better or for the worse, would seem to have been "affected." If by the widening of Halliday Street, and the consequent improvement in means of access and in other amenities, these lands will, in the opinion of the Board, be appreciated in value, the Board is in my judgment entitled to say that these lands "will in their opinion be affected by the execution of the scheme."

In this conclusion, I am fortified by the provisions contained in section 78 of the Act, and with all respect I am unable to agree with Greaves J., in attaching no importance to that section. The section provides in substance that on application by the owner and on payment by him of a sum "to be fixed by the Board," that is, a sum arrived at apparently by a process of negotiation or 'haggling,' the Board shall abandon the proceedings for the compulsory acquisition of any land, not being land required for the execution of the scheme. The appellant contends that this section should be construed as dealing only with land which, for any reason, has become "superfluous." Any such construction appears to me to be strained and unnatural. The applications have in fact to be made at a time when in ordinary course it could not be predicted that any land originally "required" had become superfluous. The words "required for the execution of the scheme" appear clearly to refer to section 41, clause (*a*), and the lands that may be dealt with under this section are

1917

MANI LALL SINGH v. TRUSTEES FOR THE IMPROVEMENT OF CALCUTTA.

TEUNON J.

the additional lands which the Board had proposed to acquire as being lands "affected" within the meaning of section 42, clause (*a*). In other words, if in respect of such lands the Board and the owner can arrive at an agreement as to the measure of the "affection" or appreciation, the Board, instead of completing the acquisition and dealing with the lands thereafter under the provisions of section 81, may realise forthwith the improved value, or a reasonable share in the improved value, resulting or likely to result from their expenditure. It is contended that the provisions of section 80, which render the land, in respect of which such payment has been made, liable to inclusion in subsequent improvement schemes, militate against the construction which I place on section 78. I am unable to agree. In any subsequent scheme, the value determined by the first scheme becomes the starting point, and there is nothing inequitable in including the land in the second, whether by reason of its being required for, or by reason of its being still further appreciated in value by, such second scheme.

In conclusion, I should say that the equity of the principle which requires contribution from private owners in respect of an increase in the value of their properties resulting from improvements effected out of public funds has now long been recognised. Such contribution may be obtained by the imposition of a "betterment" or "improvement" charge; or of a "frontage rate", or by the method of recoupment. It would indeed have been matter of surprise if in an Act passed in the year 1911 in order to the carrying out of large measures of town improvement, the Legislature had omitted to secure any portion of the improved value "in ease of the burden upon the ratepayers." In this Act we find no indication of frontage rates or improvement charges. We might,

therefore, reasonably expect to find recognition of the system of recoupment. That system may in practice result in heartburning as between A, whose land has been included in the acquisition area and his neighbour B, whose land has been left out. Doubtless it is this result which has led to the charges levelled against the system, and against this Act if construed as sanctioning the system, namely, that it is arbitrary, unjust, authorises confiscation and the levy of blackmail, and leads or may lead to oppression. There may be particular instances of hardship, but as between the private owner and the general body of ratepayers or tax-payers the method, in my opinion, is essentially just. Further, in the Act, against the abuse or misuse of the powers conferred, ample safeguards have been provided. I am not, however, to be understood as saying that these considerations have weighed with me in construing the Act.

In my judgment, in sections 42, 78 and 81 of the Act, clear and plain provision has been made for the taking of additional or excess land for the purpose of securing to the ratepayers, or their representatives the Board of Trustees, the increase in value or part of the increase in value resulting, or likely to result from the improvements effected. It follows that the acquisition of such lands is in furtherance of the objects of the Act, and that under section 69 the Board may, with the previous sanction of the Local Government, acquire such lands under the provisions of the Land Acquisition Act, 1894.

In this view the answer to the question referred to the Full Bench, in my opinion, should be in the negative.

RICHARDSON J. The clause on which the answer to this reference mainly depends, is contained in an

1917

MANI LALL SINGH v. TRUSTEES FOR THE IMPROVEMENT OF CALCUTTA.

RICHARDSON J.

Act of 1911 for the improvement and expansion of Calcutta in various ways involving the acquisition of land either by agreement or, subject to the payment of compensation to the owner, by compulsion. The machinery set up is a Board of Trustees, invested with special powers for carrying out the objects of the Act. The full name of the Board is "The Trustees for the Improvement of Calcutta" [section 3]. The short name, which is generally used, is "the Board" [section 2 (*c*)]. Chapter II relates to the constitution of the Board and cognate matters. The principal function of the Board is to prepare and execute "improvement schemes" and "re-housing schemes" which are dealt with in Chapter III. By definition [section 2] the term "improvement scheme" means "a general improvement scheme or a street scheme, or both." Chapter IV headed "acquisition and disposal of land" includes four sections with some bearing on the matter in hand. They are sections 68 and 69 and sections 78 and 81. The remaining chapters have little relevancy. Their headings are Chapter V, "Taxation," Chapter VI, "Finance," Chapter VII, "Rules" and Chapter VIII, "Supplemental Provisions." There is also a schedule which, in conjunction with section 71, modifies in some particulars the Land Acquisition Act, 1894. Land is compulsorily acquired under the provisions of the latter Act as modified.

Chapter III which includes the disputed clause [section 42 (*a*)] is the most important in the Act. It forms the constructive part to which the rest of the Act is subordinate. Sections 36 and 39 indicate the conditions under which the Board are empowered to frame "general improvement schemes" and "street schemes." The next few sections apply to improvement schemes generally. Section 41 indicates what an "improvement scheme" must comprise and section

42 what it may comprise. When such a scheme has been framed, provision is made (*a*) for its publication in the Government Gazette and in local newspapers "with a statement of the period within which objections will be received," [section 43], (*b*) for notice to the Chairman of the Corporation in case the Corporation may think fit to make any representation with regard to the scheme, and (*c*) for service of notice individually on the owners and occupiers of land "which the Board propose to acquire in executing the scheme." The notice to an owner or occupier shall, *inter alia*, "require such person, if he dissents from such acquisition, to state his reasons in writing within a period of sixty days" [section 45 (2)(*b*)]. By section 47 the Board is required to consider all objections, representations and statements of dissent received under the preceding sections and to hear all persons making them who may desire to be heard. By the same section, when the prescribed procedure has been followed, the Board may either abandon the scheme or submit it to the Local Government for sanction. If sanction is applied for and granted, then, by section 49, the fact is to be announced by notification, and "the Board shall forthwith proceed to execute the scheme." Section 50 makes provision for the alteration of a sanctioned improvement scheme before it has been carried into execution. The rest of the Chapter need not be further noticed.

As Mr. Das argued, clause (*a*) of section 42 must clearly be read with clause (*a*) of section 41. There are two categories of land, land *required* for the execution of the scheme, for the acquisition of which provision must be made in the plans, and land *affected* by the execution of the scheme, for the acquisition of which provision may be made. The controversy relates to the words "affected by the execution of the

1917

MANI LALL SINGH v. TRUSTEES FOR THE IMPROVEMENT OF CALCUTTA.

RICHARDSON J.

scheme" and the extent or nature of the discretionary power which the clause confers. The words are, no doubt, wide and general and, because of their generality, may seem subject to possible limitation should the context require it.

There is no presumption, however, that general words are not used in a general sense. The presumption is the other way. The general rule for the construction of statutes is that the Legislature means what it says. The words best declare the intention: The *Sussex Peerage Case* (1). But owing perhaps to the imperfection of language as an instrument, or to the fact that language is sometimes misused even in Legislative enactments, it may not always be easy to say what the meaning is. The language may be doubtful or ambiguous. The Courts may have a choice between different possible constructions, and in such cases there may be subsidiary rules or principles more or less controlling the choice according to the nature of the subject matter, whether the act is penal or remedial and so forth. Beyond that there is more delicate ground where the strict literal meaning would lead to a result so absurd as to be irrational and it may be found possible to modify the meaning so as to avoid that result.

These observations merely echo what has been so often and so forcibly laid down by Judges of the highest authority in England—never perhaps more forcibly than in the case relating to the Trade Disputes Act, 1916 [*Vacher & Sons* v. *London Society of Compositors* (2)]. In another case in the same volume [*Commissioners of Inland Revenue* v. *Herbert and Others* (3)], Lord Haldane restates the law with

(1) (1844) 11 Cl. & F. 85. (2) [1913] A. C. 107.
(3) [1913] A. C. 326, 332.

particular application to legislation of a novel kind, in a passage which I venture to quote :—

"In approaching the controversy as to the meaning of these sections, I think it worth while to recall a principle which must always be borne in mind in construing Acts of Parliament, and particularly legislation of a novel kind. The duty of a Court of law is simply to take the statute it has to construe as it stands, and to construe its words according to their natural significance. While reference may be made to the state of the law, and the material facts and events with which it is apparent that Parliament was dealing, it is not admissible to speculate on the probable opinions and motives of those who framed the legislation, excepting in so far as these appear from the language of the statute. That language must indeed be read as a whole. If the clearly expressed scheme of the Act requires it, particular expressions may have to be read in a sense which would not be the natural one if they could be taken by themselves. But subject to this the words used must be given their natural meaning, unless, to do so would lead to a result which is so absurd that it cannot be supposed, in the absence of expressions which are wholly unambiguous, to have been contemplated."

Now, if that be the spirit in which a question of this nature should be approached, it seems desirable to determine the ordinary and natural meaning of the words used in the clause before us before considering whether by any legitimate process of construction those words can or should be made to yield some other meaning.

In the first place the only limitation imposed by the clause itself, on the locality of the land affected, is that the land must be in the area comprised in an improvement scheme which has been subjected, or

1917

MANI LALL SINGH v. TRUSTEES FOR THE IMPROVEMENT OF CALCUTTA.

RICHARDSON J.

laid open, to the fire of criticism which the Act allows and invites.

Then as to the word "affected," "affect" in its primary or dictionary sense is an extensive but colourless word. But it is a word which easily takes colour from the context in which it is used. According to the context, it may mean affect in one way or the other, for the worse, or for the better. It may be that it often has the secondary sense of affecting adversely. An illustration will be found in the third paragraph of the Preamble. An Act which affects a previous Act is an Act which alters or is inconsistent with the previous Act.

In the present context, the scheme is an improvement scheme. The full phrase is "land affected by the execution of the improvement scheme." To my mind at any rate that suggests land affected for the better; and, in my opinion, though the words may be wide enough to include land prejudicially affected, should the Board choose to acquire such land, they specially include and signify land beneficially affected.

As to the words—"by the execution of the scheme"—which qualify the word affected, I cannot doubt that they naturally and obviously refer not only to the period of construction but also to the period immediately following when the improvement scheme is completed and in operation "and a going concern" [*Silas Harding* v. *The Board of Land and Works* (1)]. Mr. Mitter suggested that "the execution of the scheme" must mean the same in section 42 (*a*) as in section 41 (*a*). But the two expressions "*required for* the execution of the scheme" and "*affected by* the execution of the scheme" must each be construed as a whole.

(1) (1886) L. R. 11 A. C. 208, 211.

It follows then that, in my opinion, the whole clause is wide enough to embrace a discretionary power, on the part of the Board, in framing an improvement scheme, to make provision for the acquisition of land in the area specified which will, in their opinion, be beneficially affected by the execution of the scheme as an accomplished fact.

If that be so, provision may clearly be made for the acquisition of land for purposes of recoupment. It is said, that introduces a novel power to which the Act makes no express reference. But if the power comes within the ambit of the phraseology, the criticism is at best inconclusive. No one denies the generality of the words and it is the function of general words to include things not specially named. The source of the words appears to be the similar but not in all respects identical Act in force in Bombay (Bombay Act IV of 1898) though counsel was stopped by the Court from arguing that what may have been done in Bombay under that Act was of any assistance in interpreting the Calcutta Act. The clause in the Calcutta Act fills a prominent place and means something. As it stands, there is no restriction on the purposes which the Board may have in view in exercising their discretion. The purpose of recoupment is not excluded. Undoubtedly the power to acquire land for that purpose is a large power, but that fact by itself is not a sufficient reason for limiting and cutting down general words, still less for putting in words which are not there.

The construction of the disputed clause thus arrived at, while it conflicts with nothing in the Preamble or any other part of the Act, seems to me supported and confirmed by the provisions of section 78 and section 81.

The Preamble even if it controls the enacting provisions, which it does not, creates no difficulty.

1917

MANI LALL SINGH v. TRUSTEES FOR THE IMPROVEMENT OF CALCUTTA.

RICHARDSON J.

Recoupment may not be directly a method of improvement on the same plane with the methods specified in the first paragraph, but indirectly it may be a method of great, and possibly indispensable, service. The power to acquire land for that purpose may easily, without straining the language at all, be included among the special powers with which the second paragraph contemplates that the Board should be armed "for carrying out the objects of this Act."

Whatever may be the true construction of the disputed clause, sections 68 and 69 can present no difficulty. They give a merely subsidiary power to acquire land just as sections 24 and 25 give the subsidiary powers of making contracts and spending money, and these subsidiary powers are conferred in order that improvement schemes (whatever they may comprise) and re-housing schemes may be carried out.

Under section 69 of the Act power to acquire land compulsorily is given in the wide terms used in sections 24 and 25, "for carrying out any of the purposes of the Act." If that is a limitation it is a limitation so wide in its extent that if not expressed it would have to be understood. Anything which the Act permits or directs to be done will come within the phrase. Improvement schemes "which the Board shall forthwith proceed to execute" are within it, and as regards acquisition there is no difference between land included under section 41(*a*) and "affected" land (whatever the expression means) included under section 42(*a*). Land of both kinds is acquired for carrying out one or other of the purposes of the Act and may for that reason be acquired either by agreement or compulsorily. It is said section 68 does not mention the purposes of the Act but empowers acquisition by agreement of "any land which the Board are authorized to acquire." Possibly those words were employed, so as

to include not only all the lands which may be acquired compulsorily under section 69, but also land which under clause (*b*) of section 50 may be acquired by agreement but not—without the formalities attendant on framing a scheme—by compulsion. However that may be section 68 cannot authorise the acquisition, even by agreement, of any land for carrying out some purpose which is not a purpose of the Act. The suggestion that "affected" land included in a framed and sanctioned scheme may be acquired by agreement under section 68 but not by compulsion under section 69 seems to be unfounded.

Section 78, with which must be read section 13 of the schedule, provides for the abandonment (in consideration of a special payment) of the acquisition of land the acquisition of which has been sanctioned in connection with some improvement scheme but 'which is not required for the execution of the scheme." These words, read with sections 41(*a*) and 42(*a*), seem to point to land entered for acquisition in a sanctioned improvement scheme not as land "required for the execution of the scheme" under section 41(*a*) but as land not required but "affected" under section 42(*a*). Section 78 seems to presuppose that persons interested will know from the outset, or as soon as a scheme is published, what lands are "required" and what lands are "not required." This they will do if land "not required," signifies or includes "affected" land.

It is suggested that the section refers to land which is not required for carrying out a scheme because of some alteration made under section 50. But apart from the result of this interpretation to which I shall presently advert, the special provisions of section 78 seem too elaborate to be adequately accounted for in that way, in as much as it cannot

1917

MANI LALL SINGH v. TRUSTEES FOR THE IMPROVEMENT OF CALCUTTA.

RICHARDSON J.

be predicated that alterations will be numerous or important. Moreover, if it is the interest of the Board to withdraw from the acquisition of any land, the withdrawal will presumably take place at their own initiative under section 48 of the Land Acquisition Act. No owner is compelled to make an application under section 78 of the Calcutta Improvement Act, and if he knew that the Board meant to withdraw he would probably refrain from doing so in order to escape from the special payment and in order to obtain any damages to which he might be entitled under section 48 of the Land Acquisition Act.

After land has been acquired or the title has vested, the Board may proceed under section 81. and this applies to all land—including affected land—which comes into the hands of the Board and is not required for the actual execution of a scheme.

Now if "affected" land includes land beneficially affected, acquired for purposes of recoupment, it will appear that such land might well be the special object of the powers conferred by these two sections.

If the relevant provisions be fairly construed, apart from any preconceptions as to what the Legislature ought or ought not to have done, they show, I think, with reasonable certainty, that the Board were intended to have power to take land for purposes of recoupment and that section 78 and section 81, particularly the pre-emption clause, were enacted principally—though perhaps not wholly—for the benefit of the owners of such land. This construction leads to no inconsistency or repugnancy and gives the Act as a whole a reasonable and intelligible meaning.

The reference to this Bench has been occasioned by a difference of opinion in the Court on a pure question of construction, and, that being so and this Bench not being altogether unanimous, I state my

own opinion with diffidence. I am not however led to alter that opinion by any merits apparent in the alternative construction of the disputed clause which is offered. As Greaves J. has said, it all turns on the word "affected." If the significant word "injuriously" be in effect prefixed and the expression "affected by the execution of the scheme" be read as if it occurred in a section relating to the payment of damages and not in a section relating to the framing of an improvement scheme, the meaning so obtained is not the meaning of the words as they stand. This violent treatment of the clause seems to rest entirely on the series of English cases by which the true meaning of the words "injuriously affected by the execution of the works" in section 68 of the Lands Clauses Consolidation Act, 1845, was settled (Cripps on Compensation, 5th Edition, page 136).

According to this view the only purpose of section 42 (*a*) was to enable the Board to acquire land, in respect of which they might otherwise have to pay damages for injurious affection in cases in which such damages are claimable. But this is already partly provided for by sub-section (*2*) of section 49 of the Land Acquisition Act. This view again involves the interpretation of sections 78 and 81 in the manner already touched upon, according to which they were designed to enable the Board to make a profit out of the abandoned parts of their various undertakings, or to finance themselves out of land entered in their plans through errors of calculation or judgment.

The construction of section 42 (*a*) on which this result depends, does not appear to be admissible, and the result itself compares unfavourably in point of probability with the result, so much canvassed, of giving to the words their natural scope and effect.

1917

MANI LALL SINGH v. TRUSTEES FOR THE IMPROVEMENT OF CALCUTTA.

RICHARDSON J.

If an Act of this kind is to achieve its objects, the powers which must be taken are necessarily large and, *inter alia*, means must be furnished for raising the money required. At the present day there can be no initial improbability in finding in such an Act provision made for what is known as betterment, or for what is known as recoupment. Some such provision, if it exists, need create no surprise. The principle underlying betterment and recoupment has received legislative recognition in various Acts and in many ways. In practice it may be difficult to combine contribution with equality of treatment. In a case already referred to [*Silas Harding* v. *The Board of Land and Works* (1)] some violence was done to the strict grammatical meaning of the enactment there in question in order to prevent an inequality which might have extended to some land being taken without any compensation at all. It is one thing, however, to determine the true antecedent of a relative word like "such" and quite another thing to alter the language of the Act in the manner which is suggested as proper in the present case. Our duty is to construe the Calcutta Act as it stands without entering into questions of policy and expediency further than the language necessitates. In that Act no attempt is made to frame an elaborate and possibly costly scheme of contribution. The method adopted is an extension of the power to take land compulsorily and there is at least this to be said that a man whose land is taken for purposes of recoupment is in no worse case than the man whose land is taken for the actual execution of a scheme. The former has the benefit of sections 78 and 81 and though it is a benefit at which he may look with somewhat jaundiced eyes—and may be pardoned for so doing—there it is.

(1) (1886) L. R. 11 A. C. 208, 211.

Hardship in some degree may be inevitable in connection with any scheme or set of schemes involving the taking of land on a considerable scale in a great city. But the Act deprives no man of his property without compensation. The presumption that the Legislature will not interfere with private rights without compensation is not in question.

I do not know what the position is, but it is at least conceivable that without the aid of recoupment the operations of the Board, entailing an expense commensurate with the size and importance of Calcutta, would come to a standstill, so that there would be no improvement and expansion of the city in the interest of the present and future generations of citizens and the Act would be a dead letter. If the construction of the Act is to depend on results this consideration cannot be entirely neglected.

In conclusion I may be permitted to emphasize that, if the power in question is discretionary, the duty and responsibility of carrying out the provisions of the Act and giving effect to the statutory purpose and directions are laid upon a Board of Trustees, specially constituted, and that among other safeguards the Act has been careful to ensure full publicity and full opportunity for the ventilation of objections to any improvement scheme which may be proposed.

I should also add that as regards the preliminary objection to the hearing of this reference, I agree with what has been said by my brother Fletcher. So long as the judgment in *Chandra Kanta's Case* (1) stands, the Board cannot, as I understand that judgment, acquire any land compulsorily for purposes of recoupment.

In the circumstances looking at the language and the objects of the Act, I am respectfully of opinion

(1) (1916) I. L. R. 44 Calc. 219 ; 21 C. W. N. 8.

1917

MANI LALL SINGH v. TRUSTEES FOR THE IMPROVEMENT OF CALCUTTA.

that this power to acquire land for purposes of recoupment was within the contemplation of the Legislature. I agree with Fletcher J., and concur in the answer which he proposes to give to the question referred.

CHAUDHURI J. I think this reference to a Full Bench of this Court is competent, although one of the referring Judges considers the case of *The Trustees, etc.*, v. *Chandra Kanta Ghosh* (1) distinguishable to the extent that small portions of the land have been cut off in this case, whereas in that case no portion of the land was similarly treated, and another learned Judge may be said to have implied as much. The main question is whether the decision, in the *Trustees for the Improvement of Calcutta* v. *Chandra Kanta Ghosh*(1), that the Calcutta Improvement Act (Beng. V of 1911) does not allow the compulsory acquisition of land for recoupment is right or wrong.

The question has been elaborately argued and practically the whole of the Act beginning from the Preamble has been analysed and examined, but it seems to me that it is really a question as to the meaning of the word "affected" in section 42 of the Calcutta Improvement Act. Section 41 deals with matters which *must be* provided for in improvement schemes under the Act and section 42 with what *may be* provided for. "Improvement scheme" is defined in section 2 clause (*f*) as meaning a general improvement scheme or a street scheme, or both. Section 36 lays down when a general improvement scheme and section 39 when a street scheme may be framed. In this case we are concerned with a street scheme but sections 41 and 42 deal with improvement schemes generally and no separate provision has been made in the Act for acquisition of land in respect of street

(1) (1916) I. L. R. 44 Calc. 219 ; 21 C. W. N. 8.

schemes, whereas in the Bombay Act (IV of 1898) acquisition of land *necessary for* or "*affected*" by the execution of a street scheme has been dealt with together, in section 31 clause (*a*). These are dealt with separately in sections 41 and 42 of the Calcutta Act. The expression "affected" has apparently come from the Bombay Act, and although there is no express provision in the Bombay Act authorising recoupment, the same question has apparently not arisen under that Act.

It is quite clear that section 42 provides for acquisition of land which is not covered by section 41, namely, of land other than that required for the execution of the scheme. It provides for acquisition by the Board of any land in the area comprised in the scheme, which will in their opinion be affected by the execution of the scheme. The learned Judges in *Chandra Kanta Ghosh's Case* (1) have said that 'affected' is not a word of art, but of ordinary English, capable of a very large meaning" adopting the language of Wills J. *In re Buckinghamshire County Council* v. *Hartfordshire County Council* (2). They think that having regard to the context it means "neither beneficially affected or improved in value, nor prejudicially affected or impaired in value," but signifies acted upon physically or materially. "They say that in this section affected land means land in respect of which there has been physical interference with any right, public or private, which the owner is entitled to exercise in connection therewith." The words "physically or materially acted upon", quoted from the Oxford Dictionary, have little to do with "physical interference" in the passage above quoted which has been taken from the

(1) (1916) I. L. R. 44 Calc. 219; 21 C. W. N. 8.

(2) [1899] 1 Q. B. 515.

1917

MANI LALL SINGH v. TRUSTEES FOR THE IMPROVEMENT OF CALCUTTA.

CHAUDHURI J.

argument of Mr. Thesiger on behalf of the defendant in error in *The Metropolitan Board of Works* v. *McCarthy* (1), who used those words in connection with his definition of the right to compensation in respect of property *injuriously affected*, when he sought to reconcile and explain the various cases on the subject. The test submitted by the learned counsel was accepted by Lord Cairns (p. 243) and by Lord Chelmsford with qualification (p. 256) for purposes of the case before them. The words were used to define the expression "*injuriously affected*" in connection with property. The word "physical" was used to distinguish the case from cases of that class, where the interference complained of was "not of a physical but rather of a mental nature or of an inferential kind." The words "a right, public or private, which the owner of the property is entitled to make use of" were used to distinguish the case from such cases as the *Hammersmith and City Railway Co.* v. *Brand* (2). Although the learned Judges have said that "affected" in section 42 does not mean prejudicially affected or impaired in value," they have really adopted the definition of "injuriously affected" given in *The Metropolitan Board of Works* v. *McCarthy* (1). Section 42 does not deal with compensation nor does it in any manner indicate that it relates to compensation. It supplements section 41 and provides for what may be included in an improvement scheme, in addition to what must. The sections relating to compensation come much later in a different chapter, *viz.*, Chapter IV and the Schedule. Section 69 deals with compulsory acquisition under the provisions of the Land Acquisition Act, 1894, modified as indicated in the Schedule referred to in section 71 (*b*). If it was intended to place the Board in a position "to escape from the payment of damages" by allowing them

(1) (1874) L. R. 7 H. L. 243. (2) (1868) L. R. 4 H. L. 171.

to acquire severed or injuriously affected land in their improvement schemes, Chapter IV or the Schedule would have been the proper place for providing for it. Section 42 merely permits the inclusion of land in the scheme which in the opinion of the Board may be affected by the execution of the scheme. It does not say land affected by the execution of the scheme must be acquired. Whether the land will be affected or not is left to be considered by the Board. They have liberty to include what in their opinion may be affected, which may include more than what may be actually affected. They have, it is said, been so empowered "to escape from the payment of damages," namely, damages for such physical interference with the land or its incidents which may lessen its value. The definition adopted includes interference with rights, public or private, which give an additional market value to the property from the uses to which the owner or occupier might put it; public rights, such as the right of access to premises by a public highway; and private rights, such as the obstruction of easements, such as rights of way, of light, of support, are included. The breach of restrictive covenants for the benefit of other land, and the prevention of the carrying out of covenants relating to land also come in. It seems to me that the definition adopted is vague and indefinite, and may include a great deal more than what the Land Acquisition Act as modified by this Act provides for in respect of damages or compensation. It strikes me that if it was intended to safeguard the Board in respect of injuriously affected property, the Act would have clearly defined the matter and not left it so vague. There can be no damages unless the property is impaired in value. The learned Judges have therefore really held that affected means "prejudicially affected

1917

MANI LALL SINGH v. TRUSTEES FOR THE IMPROVEMENT OF CALCUTTA.

CHAUDHURI J.

or impaired in value," although they say at the outset of their judgment that the word does not mean it. They say the opposite view may include "any land or all land in the area, for the whole area may be considered benefited by the scheme." They look upon this as a forced and unnatural contention. I did not understand the learned Advocate-General, who appeared for the appellant, to go so far. He conceded that the section might be read as providing for the acquisition of land, either beneficially or prejudicially affected, but his argument was that it related only to such land as the Board considered affected by the *execution of the scheme*, which he said were the governing words of the section. Section 41 deals with the land required for the scheme and section 42 with land affected by the execution of the scheme. If it is unnatural to hold that the Legislature intended the Board to benefit by the acquisition of property beneficially affected or improved in value, it is also unnatural to hold that in discharging a public duty for the benefit of the public, the Board was provided with power to take up property prejudicially affected or impaired in value.

Sections 41 and 42 merely provide for the framing of schemes, which have to be notified under section 43. Notice as to the proposed acquisition has to be served under section 45 on persons interested, inviting their objections. The objections have to be considered by the Board under section 47, and then the sanction of the Government has to be obtained after setting out the objections. Sanction may then be given by the Government with or without modification under section 48. The sanction has to be notified by the Government [section 49] and then the Board is authorised to execute the scheme. Publicity of the scheme is provided for, objections have to be considered and submitted to the Government and sanction can then be

obtained. These are undoubtedly safeguards against undue interference. The Board cannot proceed to acquire any land until the sanction has been notified as above.

Chapter IV deals with the acquisition and disposal of land. Section 68 deals with acquisition by agreement and section 69 with compulsory acquisition, that is to say, the Act provides for acquisition in two ways, namely, by private treaty and compulsorily under the Land Acquisition Act. They both cover the same ground. They do not deal with different classes of land, namely, land necessary under section 41 or land considered affected under section 42. It seems quite clear that lands under both these heads may be acquired in either way. The learned Judges in *Chandra Kanta Ghosh's Case* (1) have emphasized the words *for carrying out any of the purposes of the Act* occurring in section 69 as distinguishing it from section 68 where those words do not occur. They have in this overlooked the provision in section 24 which has to be read with section 68 which empowers the Board to enter into contracts *necessary or expedient for carrying out any of the purposes of the Act*, which really means necessary under section 41 or expedient under section 42. In discussing the purposes of the Act the Preamble has been considered by them. I am unable to agree that "the re-housing of persons of the poorer and working classes displaced by the execution of improvement schemes" is a separate head of the objects of the Act. It comes under the head "The improvement and expansion of Calcutta." The punctuation shows that it is part of the sentence beginning with the words "acquiring land for the said purposes, etc." The sentence following it is "and otherwise as hereinafter

(1) (1916) I. L. R. 44 Calc. 219.

1917

MANI LALL SINGH v. TRUSTEES FOR THE IMPROVEMENT OF CALCUTTA.

CHAUDHURI J.

appearing" which does not run with it, if it is treated as a separate head, but it grammatically follows the portion governed by the preposition "by" after the words "expansion of Calcutta." Acquisition of land for purposes of recoupment is not specified as one of the objects of the Act. It is a means for effecting an object. It is not mentioned as an object in the Preambles of the Acts which have been brought to our notice which explicitly provide for recoupment. It is scarcely to be looked for in the Preamble. So far as the Calcutta Improvement Act is concerned, section 42 clearly provides for acquisition of land other than that required for the execution of improvement schemes. "Affected land" may be sanctioned by the Government to be acquired, but what is to be done with such land. The acquisition may be "to escape payment of damages," but what is the Board to do with such property. Power of disposal by them is provided for by section 81 by which also the right of pre-emption is given to the owner of the land. Section 78 provides for abandonment of acquisition of land which is not required for execution of the scheme even after sanction in consideration of payment by the owner of a sum to be fixed by the Board, which clearly covers land under section 42. This section may be compared with section 48 of the Land Acquisition Act which provides for payment of compensation when the acquisition is not completed. Section 78 provides for exaction of payment for abandonment if the owner applies for it after the sanction for acquisition has been given and before the time fixed by the Land Acquisition Act for making claims in reference to the land. It clearly provides for recoupment. I think sections 78 and 81 taken together show that power to acquire land for recoupment has been given by the Calcutta Improvement Act, and in section 42 the

word "affected" was deliberately used as a word having a very large meaning, "to give large powers of acquisition of land outside immediate requirements." Sections 89 and 91 deal with the power of the Board to borrow, including the power to grant mortgages of property vested in the Board and sections 122 and 123 deal with credits to the capital account and the application of the capital account. The Act gives power to acquire superfluous land, to demise and sell it, to return it on payment by the owner. For the above reasons I agree with the view taken by the learned Judges who have referred this case.*

G. S.

* The final judgment of the Appeal Court (SANDERSON C.J., WOODROFFE AND CHITTY JJ.) was as follows :—

Aug. 20.

SANDERSON C.J. This was an appeal from the decision of Mr. Justice Greaves sitting on the Original Side. The plaintiff asked that the defendants should be restrained by perpetual injunction from acquiring certain premises called 10, Halliday Street, or any portion thereof, or taking any steps or proceedings, or doing any acts in furtherance or in pursuance of such attempt. Greaves J. dismissed the plaintiff's suit. The appeal was heard by my learned brothers, Mr. Justice Woodroffe and Mr. Justice Chitty, and myself, and the opinion which we formed was, in our judgment, inconsistent with a decision which had been given by a Bench on the Appellate Side of this Court in the case of the *Trustees for the Improvement of Calcutta* v. *Chandra Kanta Ghosh* (1). Therefore, in view of this divergence of opinion, we referred the matter to a Full Bench. The question which was referred was this: whether the case of the *Trustees for the Improvement of Calcutta* v. *Chandra Kanta Ghosh* (1), in so far as it holds that Act V of 1911 (B. C.) does not authorize the Board of Trustees to acquire land compulsorily for purposes of "recoupment," *i.e.*, by selling or otherwise dealing with the land under section 81 or by abandoning the land in consideration of the payment of a sum under section 78, was rightly decided.

The majority of the Full Bench has answered that question in the following way:—the case of the *Trustees for the Improvement of Calcutta* v. *Chandra Kanta Ghosh* (1), in so far as it holds that Act V of 1911 (B. C.) does not authorize the Board of Trustees to acquire land compulsorily for purposes of "recoupment," *i.e.*, by selling or otherwise dealing

(1) (1916) I. L. R. 44 Calc. 219.

1917

MANI LALL SINGH v. TRUSTEES FOR THE IMPROVEMENT OF CALCUTTA.

with the land under section 81 or by abandoning the land in consideration of the payment of a sum under section 78, was not rightly decided. The result of that is that, in our judgment, this appeal must be dismissed with costs, *i.e.*, the costs of the Trustees and also of the Collector, both as regards the Appeal and as regards the Reference to the Full Bench.

WOODROFFE AND CHITTY JJ. concurred.

Appeal dismissed.

Attorney for plaintiff, appellant: *Rames Chandra Basu.*

Attorneys for the defendants, respondents (Trustees): *Morgan & Co.*

Attorney for the added defendant, respondent: *C. H. Kesteven.*

CRIMINAL REVISION.

Before Teunon and Richardson JJ.

1917

April 30.

BAIDYA NATH BOSE

v.

EMPEROR*

Motor Vehicle—Motor Vehicles Act (VIII of 1914)—Rules framed thereunder by Governor-in-Council—Rules 3 and 19—Liability of owner of taxi-cab for rash and negligent driving by his servant.

The owner of a motor vehicle is liable, under Part II, rule 3, of the Rules framed by the Governor-in-Council under s. 11 of the Indian Motor Vehicles Act (VIII of 1914), for breach of rule 19 by his licensed driver.

Where the driver of a taxi-cab negligently drove the same into a drain causing injury to the passengers in the car:

Held, that the owner of the taxi-cab was liable to prosecution and punishment, under s. 16 of the Act read with the aforesaid rules 3 and 19, for the act of his driver.

Thornton v. *Emperor* (1) followed.

* Criminal Revision No. 320 of 1917, against the order of K. B. Das Gupta, 4th Presidency Magistrate, Calcutta, dated Jan. 15, 1917.

(1) (1911) I. L. R. 38 Calc. 415.

THE petitioner was the owner of taxi-cab No. BE 1, which used to be driven by licensed drivers in his employment. On 14th September, 1916, at about 2-20 A.M., the driver in charge of the car named Rafiuddi, while proceeding along Karryah Road, drove into a drain injuring the passengers he was carrying. On the 25th instant, the Deputy Commissioner of Police required the petitioner to state the name and license number of the driver, and the former complied with the request the next day. It appeared that the driver had since then absconded. Proceedings were at first taken against him and warrants issued, but no trace of his whereabouts having been obtained, a summons was taken out against the petitioner as the owner of the car on 9th January, 1917, under Part II, rule 3, read with rule 19 of the Rules, framed under s. 11 of the Act by the Governor-in-Council. See *Notification No. 4095P., dated 1st April, 1915*, published in the *Calcutta Gazette, 14th April, 1915, Part I, p. 677.*

Rule 3 is as follows :

No person shall drive or have charge of, or cause or permit to be used, any motor vehicle or trailer which does not in all respects conform to these rules or which is so driven or used as to contravene any of these rules.

Rule 19 runs as follows :—

No motor vehicle shall be driven recklessly or negligently, or at any speed or in any manner which is likely to endanger human life or to cause hurt or injury to any person or animal or damage to any goods carried in any vehicle or by any person, or which would be otherwise than reasonable and proper with due regard to all the circumstances of the case, including the nature, condition and use of the street or public place and the amount of traffic which is actually on it at the time or which may reasonably be expected to be on it.

The petitioner was tried and convicted by the Fourth Presidency Magistrate, on the 15th January, 1917, and sentenced, under s. 16 of the Act and rule 3, read with rule 19 as aforesaid, to a fine. He then

1917

BAIDYA NATH BOSE v. EMPEROR.

moved the High Court and obtained the present Rule.

Babu Santimoy Majumdar, for the petitioner.

Cur. adv. vult.

TEUNON J. In this case the petitioner has been convicted under Part II, rule 3, read with rule 19 of the Rules framed by the Governor-in-Council under section 11 of the Indian Motor Vehicles Act (VIII of 1914), for the purpose of regulating the use of motor vehicles in Calcutta.

The petitioner is the owner of taxi-cab No. BE 1, and it has been found that on the night of the 14th September last the licensed driver placed by the petitioner in charge of his car drove so negligently as to overturn the car into a roadside drain and cause injury to the passengers.

It is not disputed that the driver has thereby contravened rule 19, and the question is whether, by virtue of rule 3, the owner against whom, on the disappearance of the driver, proceedings have been taken, is liable for the acts and the conduct of his servants.

Rule 3, in so far as applicable to the present case, runs as follows :—

"No person shall . . . . . permit to be used any motor vehicle . . . . . which is so driven or used as to contravene any of these rules".

The contention of the petitioner is that this rule makes an owner liable only when he abets the driver in the commission of his offence.

On the other hand, the Crown contends that the effect of the rule is that when, as in this case, an owner has permitted or authorized the use of his car, he is liable for any contravention of the rules committed by his licensee or servant, during the period of such user.

The language of the rule cannot be said to be very happy and, speaking for myself, I think the construction is not free from doubt.

But it appears that the question is concluded by authority. In the case of *Thornton* v. *Emperor* (1), a Bench of this Court placed upon a rule couched in identical terms the construction for which the Crown now contends.

No doubt that rule was framed under the provisions of Bengal Act VII of 1903 which has since been repealed and replaced by Act VIII of 1914, but there is nothing in the amending Act to suggest that the Court should now place a different construction upon the rule in question.

On the authority of the case cited, this Rule is discharged.

RICHARDSON J. concurred.

E. H. M.

Rule discharged.

(1) (1911) I. L. R. 38 Calc. 415.

APPELLATE CIVIL.

Before Mookerjee and Walmsley JJ.

1917

May 4.

BEHARI LAL GHOSE

v.

SINDHUBALA DASI.*

Occupancy Holding—Transferability—Gift, validity of—Revocation of gift —Transfer of Property Act (IV of 1882), ss. 122, 123, 126.

In cases of transfer by gift of occupancy holdings, the question of transferability cannot be raised by the heir of the donor to the prejudice of the donee or his representative in interest.

Rahim Jan Bibi v. *Iman Jan* (1) referred to.

Where a gift duly registered and executed is not suspended or made revocable on the happening of any specified event or in any of the cases (save want or failure of consideration) in which, if it were a contract, it might be rescinded as provided for in s. 126 of the Transfer of Property Act; it cannot be maintained that the property comprised in such gift continued to form part of the estate of the donor. The property ceased to be part of the donor's estate and the heir did not succeed thereto by right of inheritance.

In cases of transfers for value, the title passes from the transferor to the transferee, although the validity of the transfer is liable to be questioned by the landlord who is not a party to the transaction and may possibly refuse to recognise the transfer.

Dayamayi v. *Ananda Mohan Roy Chowdhury* (2) followed.

Villers v. *Beaumont* (3) referred to.

Milroy v. *Lord* (4), *Richards* v. *Delbridge* (5), *Amulya Ratan Sircar* v. *Tarini Nath Dey* (6) distinguished.

* Appeal from Appellate Decree No. 1916 of 1915 against the decree of J. E. Phillimore, District Judge of Birbhum, dated May 3, 1915, affirming the decree of Khetra Nath Banerjee, Munsif of Bolepur, dated March 17, 1914.

(1) (1911) 17 C. L. J. 173.
(2) (1914) I. L. R. 42 Calc. 172.
(3) (1682) 1 Vern. 101.
(4) (1862) 4 DeG. F. & J. 264.
(5) (1874) L. R. 18 Eq. 11.
(6) (1914) I. L. R. 42 Calc. 254.

SECOND APPEAL by the defendants, Behari Lal Ghose and others.

The facts briefly are these. On the 8th March, 1890, one Nader Chand Ghosh executed a deed of gift in favour of his widowed daughter, Suchand Mukhi Dasi, transferring the disputed lands which constituted his occupancy holding. The document was duly attested and registered and the donee took possession of the properties. Nader Chand died in 1890, and his daughter continued in occupation of the properties till her death in 1898, when her daughter Sindhubala Dasi, the present plaintiff, came into possession of the properties. In 1910, the defendants, who were the nephews of Nader Chand, forcibly took possession of the lands, alleging that on the death of Nader Chand the land had passed to his widow and on her death had vested in the defendants as the reversionary heirs of the last full owner. Thereupon, on the 28th March 1913, the plaintiff instituted this suit for a declaration of her title and recovery of possession of the lands.

The defendants pleaded that Nader Chand never executed the deed of gift; that the claim was barred by limitation; that as the lands constituted a non-transferable occupancy holding, the deed of gift was inoperative in law.

On the 17th March 1914, the Court of first instance decreed the suit, remarking on the question of "non-transferability of the occupancy holding" that such question could only be raised by the landlord or his representative in interest.

On appeal, the lower Appellate Court, on the 3rd May 1915, confirmed the finding of the Court of first instance.

From that decision the defendants preferred this appeal to the High Court.

1917

BEHARI LAL GHOSE v. SINDHUBALA DASI.

Babu Brajendra Nath Chatterjee, for the appellants.

Babu Bhupendra Kumar Ghose, for the respondent.

MOOKERJEE AND WALMSLEY JJ. This is an appeal by the defendants in a suit instituted by the respondent for recovery of possession of land upon declaration of title. The land in dispute constituted the occupancy holding of one Nader Chand Ghose who died in 1890. Shortly before his death, he executed, on the 18th March 1890, a deed of gift in favour of his widowed daughter Suchand Mukhi Dasi whereby he professed to transfer the property to her. The document was duly attested and was registered as required by the provisions of the Transfer of Property Act. The donee continued in occupation till her death in 1898, when the present plaintiff, her daughter, came into possession under claim of title by inheritance. In 1910, the defendants forcibly took possession of the land on the allegation that after the death of Nader Chand Ghose the land had passed to his widow, and, upon her death, had vested in them as the reversionary heirs (nephews) of the last full owner. On the 29th March 1913, the plaintiff instituted this suit for declaration of her title and for recovery of possession with mesne profits. The defendants denied that the deed was executed by Nader Chand Ghose and contended that the claim was barred by limitation. The Court of first instance found that the claim was not barred by limitation and that the plaintiff had acquired a valid title to the property as the heiress of her mother, who had obtained the land from her father under the deed of gift already mentioned. An objection was taken before the trial Court that, as the land constituted a non-transferable occupancy

holding, the deed of gift was inoperative in law and that consequently the plaintiff had not acquired a valid title. The Court held that this question could be raised only by the landlord or his representative in interest, and accordingly decreed the suit. Upon appeal, the District Judge has confirmed the decree of the Court of first instance. On the present appeal, the defendants have argued that no valid gift could be effected in respect of a non-transferable holding, that notwithstanding the execution and registration of the deed of gift, the property continued to form part of the estate of the donor, passing upon his death to his widow, and vesting upon her death, in the defendants as the reversionary heirs to the last full owner. The decision of the Full Bench in the case of *Dayamayi* v. *Ananda Mohan Roy* (1) has been distinguished by the appellants on the ground that the principles enunciated therein are expressly limited in their application to cases of transfers of occupancy holdings for value. On the other hand, the respondents have referred to the decision in *Rahim Jan Bibi* v. *Iman Jan* (2), which is an authority for the proposition that in circumstances closely analogous to those of the case before us, the question of transferability cannot be raised by the heir of the donor to the prejudice of the donee or his representative in interest. In our opinion, the view taken by the Courts below is well founded on principle and must be upheld.

The decision of the Full Bench in the case of *Dayamayi* v. *Ananda Mohan Roy* (1) is an authority for the proposition that, in cases of transfers for value, the title passes from the transferor to the transferee, although the validity of the transfer is

(1) (1914) I. L. R. 42 Calc. 172; 20 C. L. J. 52. (2) (1911) 17 C. L. J. 173.

1917

BEHARI LAL GHOSE v. SINDHUBALA DASI.

liable to be questioned by the landlord who is not a party to the transaction. Let us consider whether this principle is applicable to cases of gifts of non-transferable occupancy holdings. Section 122 of the Transfer of Property Act defines a gift as the transfer of certain existing moveable or immoveable property, made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee. Section 123 defines the mode in which the transfer is to be effected; in the case of immoveable property, the transfer must be effected by a registered instrument, signed by or on behalf of the donor and attested by at least two witnesses. Section 126 deals with the question of revocation of gifts. The first paragraph of the section provides that the donor and the donee may agree that on the happening of any specified event, which does not depend on the will of the donor, a gift shall be suspended or revoked; but a gift, which the parties agree shall be revocable wholly or in part at the mere will of the donor, is void wholly or in part as the case may be. The second paragraph lays down that a gift may also be revoked ina ny of the cases (save want or failure of consideration) in which, if it were a contract, it might be rescinded. Then follows the important provision, in the third paragraph, that " save as aforesaid, a gift shall not be revoked." This provision is a legislative recognition of a doctrine enunciated more than two centuries ago by Lord Nottingham in the case of *Villers* v. *Beaumont* (1): " If a man will improvidently bind himself up by a voluntary deed and not reserve a liberty to himself by a power of revocation, this Court will not loose the fetters he hath put upon himself, but he must lie down under his own folly, for if you

(1) (1682) 1 Vern. 101.

would relieve in such a case, you must consequently establish this proposition, namely, that a man can make no voluntary disposition of his estate but by his will only, which would be absurd." The position, consequently, is clear, that, except in the circumstances mentioned in section 126 of the Transfer of Property Act, a gift cannot be revoked. The second paragraph of the section shows that a gift may be revoked as if it were a contract, but not on the ground of want or failure of consideration; in other words, a gift may be revoked, as a contract may be cancelled, on the ground of fraud, mistake, coercion, undue influence, misrepresentation or the like reason. No such reason is assigned in the present case. But it is argued that the donor was competent to revoke the gift immediately after execution and registration of the document on the ground that the property transferred by way of gift constituted a non-transferable occupancy holding, and that such right of revocation has vested in his heir. To test the validity of this argument, we have to consider whether the transaction could have been rescinded if it had been a contract. The section makes it plain that such rescission was not permissible. The substance of the matter is that although in contracts for sale, mortgage, lease or exchange, there is pecuniary consideration, and in a gift there is no such consideration, the right of rescission is circumscribed by the same set of circumstances. Now the decision of the Full Bench in *Dayamayi* v. *Ananda Mohan Roy* (1) shows that this transaction could not have been rescinded if it had been for valuable consideration. The inference follows that it can not be rescinded merely by reason of want or failure of such consideration.

(1) (1914) I. L. R. 42 Calc. 172.

1917

BEHARI LAL GHOSE v. SINDHUBAIA DASI

Reliance has been placed on behalf of the appellant upon the decision in *Milroy* v. *Lord* (1). That case, however, is clearly distinguishable. There the property transferred constituted 50 bank shares which were transferable only by entry in the books of the company; no such transfer was ever made, but a deed poll was executed. In these circumstances, Turner L. J. observed as follows: "In order to render a voluntary settlement valid and effectual, the settlor must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him." These remarks were followed by Jessel M. R. in *Richards* v. *Delbridge* (2) where he observed that a man may transfer his property, without valuable consideration, if he does such acts as amount in law to a conveyance or assignment of the property, and thus completely divest himself of the legal ownership which vests in the person who, by those acts, acquires the property. Consequently, to make the principle of *Milroy* v. *Lord* (1) applicable here, the appellant would have to establish that the nature of the property transferred in this case was such that no valid transfer thereof could be effected till the consent of the landlord had been obtained and the name of the transferee registered in his books. But the decision of the Full Bench shows abundantly that in cases of transfer for value, title unquestionably passes from the transferor to the transferee, even though there is no recognition by the landlord; in other words, a transfer of this description cannot be impeached by the transferor, though the landlord may possibly refuse to recognise the transfer. In our opinion, the principle of the

(1) (1862) 4 DeG. F. & J. 264. (2) (1874) L. R. 18 Eq. 11.

decision in *Milroy* v. *Lord*(1) has no application to the circumstances of the present case. Reliance has finally been placed upon the decision in *Amulya Ratan Sircar* v. *Tarini Nath Dey* (2), which is an authority for the proposition that the holder of a non-transferable occupancy holding is not competent to make a testamentary bequest of such holding. That case is clearly distinguishable, founded as it is on the fact that the bequest was revocable up to the last moment of the life of the testator and that the very moment that the bequest would come into operation, if legal and valid, was the moment when the right of the heir would accrue by operation of law. In the case before us, the gift was not revocable, and was binding as between the donor and the donee. It cannot consequently be maintained that, notwithstanding the execution and registration of the deed of gift, the property continued to form part of the estate of the donor. The property ceased to be part of the estate of the donor, and there is thus no escape from the position that the heir did not succeed to it by right of inheritance.

The result is that the decree of the District Judge is affirmed and this appeal dismissed with costs.

L. R. *Appeal dismissed.*

(1) (1862) 4 DeG. F. & J. 264. (2) (1914) I. L. R. 42 Calc. 254.

PRIVY COUNCIL.

P. C.*
1917

June 22, 25 ;
July 30.

ABDULLAH ASHGAR ALI KHAN

v.

GANESH DASS.

[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER IN BALUCHISTAN.]

Res judicata—British Baluchistan Regulation (IX of 1896) s. 10—Issue not "finally decided" in former suit—Civil Procedure Code, 1882, s. 13—Defence of fraudulent representation in suit on a bond.

Section 10 of the British Baluchistan Regulation IX of 1896 creates an estoppel by judgment only when the "matter in issue" has been "finally decided."

Sheosagar Singh v. *Sitaram Singh* (1) followed.

That was a case under s. 13 of the Civil Procedure Code, 1882, which, so far as the question under discussion is concerned, is similar to section 10 of the Baluchistan Regulation.

The appellant (defendant) had brought a suit for cancellation of a bond on the ground that he was induced to execute it by the fraudulent representations of the respondent (the present plaintiff). The first Court held that he had failed to establish the fraud, and that decision was affirmed on appeal by the District Judge. He then brought a second appeal to the Judicial Commissioner who declined to go into the merits of the case and, upholding an objection by the respondent to the frame of the suit, dismissed the appeal. In a suit brought by the respondent to enforce the bond, the appellant raised the same issue as before, and the two lower Courts held that the issue was *res judicata*, and the Judicial Commissioner dismissed an appeal to him from that decision.

Held by the Judicial Committee, that the defence in the present suit was not *res judicata*, the allegation regarding the execution of the bond on the fraudulent representations of the respondent never having been "finally decided" in the Judicial Commissioner's Court.

* *Present:* LORD DUNEDIN, LORD SHAW, LORD SUMNER, SIR JOHN EDGE AND MR. AMEER ALI.

(1897) I. L. R. 24 Calc. 616 ; L. R. 24 I. A. 50.

APPEAL No. 36 of 1916 from a judgment and decree (31st March 1914) of the Judicial Commissioner in Baluchistan, which affirmed a judgment and decree (21st November) of the Court of the District Judge, Quetta-Pishni.

The defendant was the appellant to His Majesty in Council.

The facts are sufficiently stated in the judgment of the Judicial Committee.

The only question for determination in the present appeal was whether or not the suit which gave rise to the appeal was barred as being *res judicata*.

The judgment appealed from was as follows :—

The Judicial Commissioner (MR. C. ARCHER) said: "The appellant, Abdullah Ashgar Ali, has admitted the execution of the bond on which the respondent Ganesh Dass sued him, and has also admitted that he has paid nothing on it. In a previous suit against the respondent, he endeavoured to have the bond set aside on the ground that it had been obtained by misrepresentation. The Original Court and the first Appellate Court held that the bond was not voidable on that ground; and on further appeal this Court, while expressing no final opinion as to the validity or otherwise of the agreement to dissolve partnership on which the bond was based, held that unless and until that agreement was set aside, the bond could not be impugned.

"The objections urged in this memorandum of appeal, in so far as they are not merely formal, are a repetition of the arguments of the appellant in the former suit based on his contention that the dissolution agreement and the consequent bond was obtained from him by misrepresentation. The appellant has further requested this Court to send for and inspect the plaint in a suit which he has now instituted to

1917

ABDULLAH ASHGAR ALI KHAN v. GANESH DASS.

have the dissolution agreement set aside. It is, however, not open to this Court at this stage to take into consideration the steps which appellant may now be taking to avoid the agreement. The present case has been pending for nearly 18 months, its disposal having been delayed by the appellant's efforts to have the bond set aside. These efforts have failed, and it would not be equitable that the respondent's remedy should be further delayed pending the issue of the attempt now being made to impugn the agreement of dissolution. In so far as the bond is concerned, the lower Court was, in my opinion, right in holding that the points raised by the appellant were *res judicata*. It is not the case as stated in paragraph 1 of the appeal that the Appellate Court did not examine the parties. As regards the other formal defects alleged, in so far as they exist, they are not, in the circumstances, such as to occasion a failure of justice, and are therefore cured by section 92 of the Civil Justice Regulation."

The appeal was accordingly dismissed.

On this appeal,

A. M. Dunne, for the appellant, contended that the defence to the suit which had been raised by the appellant was not barred as being *res judicata*. He was therefore entitled to have issues duly raised and his defence considered according to law, and on its merits. The judgment purporting to be effective as a *res judicata* must be one in which the issue in dispute between the parties has been "finally decided"; that is not the case here: section 10 of the British Baluchistan Regulation IX of 1896 was referred to. The merits of the issue of fraud were not gone into on the appeal to the Judicial Commissioner; the matter was therefore not finally decided. Reference was made to *Sheosagar Singh* v. *Sitaram Singh* (1) *per* Lord

(1) (1897) I. L. R. 24 Calc. 616; L. R. 24 I. A. 50.

Macnaghten, *Gunga Bishen Bhugut* v. *Roghoonath Ojha* (1), *Chunder Coomar Mitter* v. *Sibsundari Dassee* (2), and to section 13, Explanation (*1*), of the Civil Procedure Code, 1882, and section 11 of the Code of 1908. In the present suit the appellant was entitled to set up the issue of misrepresentation because the judgment of the Judicial Commissioner declared that the appellant's suit had been misconceived.

B. Dube, for the respondent, contended that the appellant was estopped from raising the defence in the present suit: Reference was made to *Soorjomonee Dayee* v. *Suddanund Mohapatter* (3), a case decided on section 2 of the Civil Procedure Code of 1859. The point "finally decided" by the Judicial Commissioner was that the bond could not be avoided as long as the dissolution agreement remained in force; and the appellant now raises substantially the same issue. The respondent, it was submitted, was entitled to the relief granted to him.

A. M. Dunne replied.

July 30.

The judgment of their Lordships was delivered by MR. AMEER ALI. The only point for determination involved in this appeal turns upon the meaning to be attached to the words "finally decided" in section 10 of the British Baluchistan Regulation IX of 1896. That section provides as follows:—

"A Court shall not try any suit in which the matter in issue has been heard and finally decided by a Court of competent jurisdiction in a former suit between the same parties in the same rights, or between parties under whom they or any of them claim."

A short statement of the facts will explain how the question has arisen.

The parties to the litigation carried on certain business in British Baluchistan in partnership with

(1) (1881) I. L. R. 7 Calc. 381. (2) (1882) I. L. R. 8 Calc. 631.
(3) (1873) 12 B. L. R. 304; L. R. I. A. Sup. Vol. 212.

1917

ABDULLAH ASHGAR ALI KHAN v. GANESH DASS.

two other men; in July 1910 they agreed to dissolve the partnership; according to the plaintiff, Ganesh Dass' accounts were duly adjusted, when a sum of over 9,900 rupees was found due from the defendant, Ashgar Ali Khan; on the 12th July a formal deed of dissolution was executed by four partners, and on the day following the defendant executed the bond on which the present suit is brought. The defendant's case is that he signed the deed of dissolution which embodied the settlement and executed the bond, agreeing to pay the amount alleged to be due from him, on the fraudulent representation of the plaintiff that the adjustment of accounts was correctly made and on the assurance that should the defendant upon the examination of the accounts at his leisure discover any mistakes they would be rectified. The defendant alleges that it was on the faith of these representations he executed the two documents. He further alleges that some days after the execution of the deed of dissolution and the bond in suit he had an opportunity to examine the statement of account, which he found to be wholly incorrect and misleading, that thereupon he called upon the plaintiff and other partners to make a proper adjustment, undertaking to pay any amount that might on such further examination be found due from him. The plaintiff, Ganesh Dass, refused to accede to the proposal, and thereupon the defendant brought a suit on the 22nd July 1911 in the Court of the Assistant Commissioner of Quetta for a cancellation of the bond of the 13th July 1910, on the ground that he was induced to execute it by the fraudulent representations of the present plaintiff. The written statement of Ganesh Dass is not on the record of this appeal, but it appears from the judgment of the Judicial Commissioner in that case that among other pleas Ganesh Dass urged that the bond being

based on the dissolution deed and being merely executed to record the manner in which the payment of the amount due to him was to be made, a suit for the cancellation of the bond alone would not lie.

The defendant's suit for cancellation of the bond came for trial before the Assistant Commissioner of Quetta, and he held that the defendant, Ashgar Ali Khan, had failed to establish his allegation of fraud. He accordingly dismissed the action, and his judgment was affirmed on appeal by the District Judge on the 30th May 1913.

The defendant thereupon preferred a second appeal under the provisions of Regulation IX of 1896 to the Court of the Judicial Commissioner of British Baluchistan, which is the final Appellate Court in that province. The Judicial Commissioner, Mr. Archer, considered that the objection of Ganesh Dass to the frame of the suit was well founded, and accordingly without entering into the merits of the case, dismissed the defendant's appeal against the orders of the lower Courts dismissing his action.

The Judicial Commissioner gave his decision in the following words, the exact import of which is not disputed. He says first :—

"Now it appears to me obvious that the respondent's objection to the frame of the suit was wellfounded, and that the plaint should either have been returned for amendment or rejected."

And then, after commenting on several mistakes in procedure in the Courts below, he proceeds as follows :—

"I purposely refrain from going in detail into the merits of the case, because they cannot be discussed without bringing in the question of the validity of the dissolution agreement, a matter which is not formally before the Courts. It is sufficient to say that after careful consideration of the record and the pleadings I am not prepared to interfere with the orders of the lower Courts dismissing the appellant's suit, since, for the reasons given above, I hold that the bond of which cancellation is sought is

1917

ABDULLAH ASHGAR ALI KHAN v. GANESH DASS.

merely consequential on the deed of dissolution of partnership, and that a suit for avoiding the bond cannot succeed as long as the dissolution deed remains in force."

On the 14th October 1912, the plaintiff, Ganesh Dass, instituted the present suit on the bond executed by the appellant on the 13th July 1910. The defendant denied liability on the ground that it had been obtained from him by the fraud of the plaintiff

It is to be observed that whilst this suit was pending in the Court of the Judicial Commissioner, the defendant brought an action to have the deed of dissolution cancelled, on the ground of fraud, but it was held that it was barred under the Statute of Limitation.

In Ganesh Dass's suit on the bond the Indian Courts have held that the issue raised by the defendant was *res judicata*, and that they were precluded by the provisions of section 10 of Regulation IX of 1896 from entering upon an enquiry whether the bond had been obtained from him on fraudulent representation. In this view they decreed the plaintiff's claim without entering into the merits of the defence. The defendant has appealed to His Majesty in Council, and it is contended on his behalf that the Indian Courts have wrongly applied the rule of *res judicata* to the defence in the present case, as his allegation regarding the execution of the bond on the fraudulent representations of the plaintiff has never been decided in the Judicial Commissioner's Court.

It appears to their Lordships that the contention is well founded. "The matter in issue" in the present suit is no doubt the same as in the defendant's own action. It is clear, however, that although the two first Courts had found against his allegation, the final Court of Appeal refused to determine the issue. Section 10 of the Regulation creates an estoppel by

judgment only when the "matter in issue" has been "finally decided." These words have received judicial interpretation in the case of *Sheosagar Singh* v. *Sitaram Singh* (1).

In that case the Board had to deal with the identical question of *res judicata* arising under section 13 of the Indian Civil Procedure Code, which, so far as the question under discussion is concerned, is *in pari materia* with section 10 of the Baluchistan Regulation Lord Macnaghten, delivering the judgment of their Lordships, explained the rule as follows :—

"To support a plea of *res judicata* it is not enough that the parties are the same and that the same matter is in issue. The matter must have been 'heard and finally decided.' If there had been no appeal in the first suit the decision of the Subordinate Judge would no doubt have given rise to the plea. But the appeal destroyed the finality of the decision. The judgment of the lower Court was superseded by the judgment of the Court of Appeal. And the only thing finally decided by the Court of Appeal was that in a suit constituted as the suit of 1885 was no decision ought to have been pronounced on the merits."

Their Lordships will therefore humbly advise His Majesty that the judgments of the Courts in India in this case should be set aside and that it should be remitted to the Judicial Commissioner of British Baluchistan to direct a re-trial by the Court of first instance. The respondent will pay the costs of this appeal and of the application made on his behalf on the 19th July 1917; the costs incurred by the parties in India will abide the result.

J. V. W.

Appeal allowed.

Solicitors for the appellant: *T. L. Wilson & Co.*
Solicitors for the respondent: W. W. Box & Co.

(1) (1897) I. L. R. 24 Calc. 616 ; L. R. 24 I. A. 50.

PRIVY COUNCIL.

P.C.*
1917

July 2, 3, 5, 6, 9, 10, 12 ; *Oct.* 30.

ABDUL HUSSEIN KHAN
v.
SONA DERO.

[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF SIND, AT KARACHI.]

Custom—Proof of custom modifying Mahomedan Law—Custom excluding women from share of inheritance of paternal relation—Bombay Regulation (IV of 1827), s. 26—Punjab Laws Act, 1872, s. 5—Essentials in proving custom—Family custom—Position and relationship of members of family—Denial by prominent member of family of existence of custom—Failure to produce Revenue Records as evidence.

On the death of a wealthy Shia Mahomedan in Sind, intestate and leaving no widow or child, the nearest surviving relations were a nephew (the plaintiff-appellant) and a sister and her son, the first and second defendants-respondents. The appellant's case was that the question as to the rights of inheritance was governed, not by Mahomedan Law, but by a custom which excluded women from any share in the inheritance of a paternal relation :—

Held, that under section 26 of Bombay Regulation IV of 1827, which had been extended to Sind, no presumption can be made in favour of the existence of a usage or custom where it is known that such usage or custom is prevalent, but it was incumbent on the appellant to allege and prove the custom on which he relied.

Daya Ram v. *Sohel Singh* (1), per ROBERTSON J., is a case under section 5 of the Punjab Laws Act, 1872, the words of which are more strongly in favour of the appellant's contention than those of section 26 of Bombay Regulation IV of 1827.

Custom binding inheritance in a particular family has long been recognised in India : see *Soorendro Nath Roy* v. *Heeramonee Burmoneah* (2) ; and the principles applicable to the proof of customs in England were not to be applied in considering such a custom as that claimed in the present suit.

* *Present :* LORD BUCKMASTER, SIR JOHN EDGE, MR. AMEER ALI AND SIR WALTER PHILLIMORE, BART.

(1) (1906) 41 Punj. Rec. 390, 419. (2) (1868) 12 Moo. I. A. 81.

Nor was it necessary to reject as useless for proving such a custom all the instances mentioned by CROUCH J. in his judgment in the Judicial Commissioner's Court. An example of each of the conditions there laid down ought certainly to be established by some witness, but it was not necessary that all should be proved in every case, as that might greatly weaken the evidence by tradition to which in a custom of the character under consideration great weight was due.

Ramalakshmi Ammal v. *Sivanantha Perumal Sethurayar* (1) referred to as to what was essential to the proof of special usages modifying the ordinary law of succession.

Held, also, assuming that the custom relied on, which had not been precisely defined by the appellant, was a custom by which in the event of intestacy daughters of the deceased were excluded in favour of their brothers, and sisters in favour of male paternal relations, that such a custom had not on the evidence been sufficiently proved.

The position and relationship of the different members of the family must always be considered in determining whether claims were not met because the rights to which they related did not exist, or whether they were put on one side because in the circumstances there was no need for asserting them.

Mirabiri v. *Vellayanna* (2) referred to.

The fact that prominent members of the families concerned denied that such a custom as alleged existed; and the non-production of the Revenue Records one of which showed a division according to Mahomedan Law, and not according to the custom here set up, were both evidence strongly against the custom.

In the opinion of their Lordships though there was much in history for the custom, and some evidence by which it received support, yet on the whole the evidence fell short of the standard to which it must attain in order to succeed in altering the devolution of property according to Mahomedan Law, to a devolution determined by a family custom.

APPEAL 14 of 1916 from a judgment and decree (9th January 1912) of the Court of the Judicial Commissioner of Sind, which reversed the decree (31st May 1910) of the Judicial Commissioner (District Court jurisdiction) and dismissed the suit.

The plaintiff was the appellant to His Majesty in Council.

(1) (1872) 14 Moo. I. A. 570, 585. (2) (1885) I. L. R. 8 Mad. 464, 465.

1917

ABDUL HUSSEIN KHAN v. SONA DERO.

The suit was for the property of H. H. Mir Hussein Ali Khan of Talpur who died intestate on 30th January 1907. He was one of the family of Mirs, and was admittedly descended from one Mir Kaku Khan. He left no issue nor widow. The appellant was his nephew, and the first defendant (first respondent) was his sister, the second defendant being her son.

The appellant stated his case in his plaint as follows :—"The parties belong to the Sunni sect and follow Sunni usages. Deceased Mir Sahib was also a Sunni and he used to follow the tenets of the Sunni sect; thus the plaintiff is entitled to half of the property left by the deceased Mir Sahib according to law. But according to the custom regulating the inheritance by females in the family of the parties and amongst the respectable Baluchis and Sardars which is ancient and which is invariable and has been acted upon from time immemorial, and which has obtained amongst Sunnis and Shias alike, a woman is entitled to her proper dowry according to the rank or status of the family, and she has no other rights of inheritance to the property of her paternal relations. This custom is binding on the family of the parties, and according to the custom plaintiff, who is the nearest retation of the deceased Mir Sahib on the paternal side, is exclusively entitled to the whole of the property left by the deceased, and defendants 1 and 2 and any other persons have no right to or interest in the property".

The defence of the respondents was that the deceased belonged to the Shia and not the Sunni sect, and that no such custom as alleged ever existed, and submitted that no custom contrary to Mahomedan law could be proved; and that the first respondent was solely entitled to the estate.

The material issues were—(7) was the deceased Mir Hussein Ali Khan a Sunni or a Shia? (9) Can the

plaintiff be permitted to prove the custom set up by him? (10) If he can, is there any valid custom excluding females from inheritance as alleged in the plaint, and if so does it bind and govern the family of the parties?

The District Court held that on 7th issue the respondent had succeeded in proving that the deceased was a Shia. On the 9th issue he held that the appellant must be allowed to prove the custom he alleged to exist. On the 10th issue he found that in the family of the Mirs to which the deceased belonged there was on the evidence a well-established custom having the force of law by which daughters and female paternal relations of the deceased were excluded from the inheritance by any male agnate. He accordingly held that the first respondent was excluded, and that the appellant was entitled to succeed to all the property left by the deceased, and made a decree in his favour.

An appeal by the respondents to the Court of the Judicial Commissioner was heard by MR. E. M. PRATT, and MR. H. N. CROUCH, respectively Judicial Commissioner and Additional Commissioner of Sind. They delivered separate judgments and agreed with the District Court as to issues 7 and 9; but on issue 10 they both came to the conclusion that on the evidence that the custom set up was not established, and that the appellant's case failed on that point alone.

The decree of the District Court was therefore reversed and the suit dismissed with costs.

The facts which led to the institution of the suit sufficiently appear in the judgment of their Lordships.

On this appeal,

P. O. Lawrence, *K. C.*, and *Arthur Grey*, for the appellant, contended there was sufficient evidence on

1917

ABDUL HUSSEIN KHAN v. SONA DERO.

the record to establish the custom claimed in the plaint to exist in the family of the deceased. The Judicial Commissioner's Court found the claim was rendered vague by the words used in it "and amongst the respectable Baluchis and Sardars," but it was submitted that those words were not applicable to the family of which the plaintiff was a member. They were only introduced because of the decision in *Pranjivan Dayaram* v. *Bai Reva* (1), and they may be treated as being irrelevant and superfluous: if so treated there would be no ambiguity in the custom pleaded The Judicial Commissioner also discussed the origin of the custom and found that if it arose on account of the inability of a woman to use a sword that she was excluded from inheritance, the custom was founded "not on legal reason, but on violence and oppression, and was therefore unreasonable". But it was unnecessary for the appellant to prove the origin of the custom. He proved 58 instances in which the custom was followed; and the respondents made no attempt to prove that there was any violence or oppression, which required to be proved and not merely suggested. Neither the respondents nor the appellant had called women as witnesses, yet the Appellate Court only comments on the omission of the appellant to call any women. No comments either by the parties themselves or by the Trial Judge were made on the fact that no woman was called. In the case of *Tyson* v. *Smith*(2) the custom there set up was upheld. But the cases as to an English custom are not of any authority for the decision of a question as to Indian ideas of custom which are very different. There is no question raised in this case as to the custom being unreasonable. If this custom is unreasonable all

(1) (1881) I. L. R. 5 Bom. 482.

(2) 1838) 9 Ad. & El. 406; 1 R. R. 539.

customs by which women are excluded might be called so, but that is far from being the case in India; and this custom, it is submitted, is a reasonable one. Customary law when proved to exist supersedes personal law which is only effective where proof of custom fails: *Daya Ram* v. *Sohel Singh* (1); and Sir W. Rattigan's Digest of Customary Law, page 1. That case was one under section 5 of the Punjab Laws Act (1872); but the law applicable here (section 26 of Bombay Regulation IV of 1827, which is extended by notification to Sind) is a similar enactment. Reference was also made to *Sundaralingaswami Kamaya Naik* v. *Ramaswami Kamaya Naik* (2), *Mohesh Chunder Dhal* v. *Sivanantha Satrughan Dhal* (3), *Ramalakshmi Ammal* v. *Perumal Sethurayar* (4), and Mayne's Hindu Law, 8th Ed., para. 50, pages 57, 58. The find ing of the District Court, it is submitted, is right.

De Gruyther, K. C., and *Sir William Garth*, for the respondents, contended that the general law which applies to all Mahomedans in India is the Mahomedan Law: see Statute 21 Geo. III, c. 70, section 17. Any custom set up must be established by very strong evidence in order to displace the personal law. The custom alleged is not one which could control or supersede the personal law. It is not ancient, it is uncertain and unreasonable, and therefore invalid, and it has not been established by the evidence. The fact that the instances are numerous where Mahomedan ladies have not claimed rights of inheritance does not prove that they do not possess such rights: *Mirabivi* v. *Vellayanna* (5). The history of the family in suit is given in the Imperial Gazetteer of

(1) (1906) 41 Punj. Rec. 390, 393.
(2) (1899) I. L. R. 22 Mad. 515; L. R. 26 I. A. 55.
(3) (1902) I. L. R. 29 Calc. 343; L. R. 29 I. A. 62.
(4) (1872) 14 Moo. I. A. 570.
(5) (1885) I. L. R. 8 Mad. 464.

1917

ABDUL HUSSEIN KHAN v. SONA DERO.

Sind, Vol. XXII, page 397 and following pages which is admissible in evidence under section 57 of the Evidence Act. Reference was also made to *Read* v. *Bishop of Lincoln* (1), and section 87 of the Evidence Act, 1872. The Revenue Records would have shown all the holders of the estates in any district. There is no evidence to show that the witnesses for the appellant ever owned the land they claim here as members of the family, and the inference to be drawn from the omission to produce the Revenue Records is that the appellant's family owned no such land. The custom, it was contended, had not been proved, and the decision of the Judicial Commissioner to that effect was right. The principle, that whoever sets up a custom varying the general law must prove it, laid down by the Board in *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar* (2), is in force in the Punjab and Sind: see *Mahomed Sidick* v. *Haji Ahmed* (3).

Arthur Grey, in reply. The usage of the country is the sole consideration of the Courts. The first case of Shia law is to be found in *Deedar Hossein* v. *Zuhooroonnissa* (4). It is said we have called no female witness. If we had done so the only comment would have been that such evidence was unreliable.

Oct. 30.

The judgment of their Lordships was delivered by LORD BUCKMASTER. On the 30th January, 1907, Mir Hussein Ali Khan of Talpur died intestate, leaving neither widow nor child. His nearest surviving relations were the plaintiff, Abdul Hussein, the son of his brother by the half-blood, one sister, the first defendant upon the record, and his sister's son, who is the second defendant. His estate, consisting

(1) [1892] A. C. 644.
(2) (1872) 14 Moo. I. A. 570, 585.
(3) (1885) I. L. R. 10 Bom. 1, 9.
(4) (1841) 2 Moo. I. A. 441.

exclusively of personal property, and largely of what we should call personal effects, is of great value, and doubtless also, from the character of many of the articles, of great personal interest to his relations. It is a dispute about the inheritance of this property that has given rise to the present appeal. The deceased was a member of the family of Talpur Mirs of Sind, who were a branch of the large Baluchi tribe. He was a Mahomedan, and, if Mahomedan law governed the question, the rights of the parties would vary accordingly whether the deceased was a member of the Shia or of the Sunni sect. If the former, the sister would inherit the whole estate; if the latter, the plaintiff would be entitled to a half. The plaintiff alleges, however, that the rights of inheritance are not to be determined according to Mahomedan law, but that they are regulated by a custom well known and distinctly ascertained, by which, notwithstanding the provisions of the Koran, women are excluded from any share in the inheritance of a paternal relation. He further alleges that, if this contention does not prevail, the deceased was a Sunni and not a Shia, and that he is therefore entitled to the more limited rights to which reference has been made. Their Lordships think it is convenient to dispose of the latter contention first.

Although the holding of religious opinion is a matter of personal faith, and ordinarily it may not be easy to determine what the nature of that faith may be, yet in a case like the present, where the question lies between two sects so sharply divided in ritual and observances, performance of prayers, and public declarations of faith as the Sunni and the Shia, it is readily capable of being determined by definite evidence of action, conduct, and observance. For reasons which their Lordships consider as conclusive,

1917

ABDUL HUSSEIN KHAN v. SONA DERO.

both the Judicial Commissioner, before whom the case was first tried, sitting as District Judge, and the Court of the Judicial Commissioner of Sind, before whom the appeal was heard, have decided that the deceased was of the Shia persuasion, and with this finding their Lordships see no reason to interfere.

There remains therefore for consideration only the question of custom, and upon this the Court of First Instance and the Court of Appeal have differed, the District Court holding that the custom was established, and the Court of the Judicial Commissioner of Sind deciding that it was not. It is from this latter decision that the present appeal proceeds.

Before proceeding to investigate the facts and circumstances that have influenced the two judgments already mentioned, it is desirable to make plain what is the position of a person like the plaintiff, who asserts that custom and not Mahomedan law gives him the rights he claims. The appellant alleges that, by section 26 of the Bombay Regulation IV of 1827, which has by notice been extended to the District of Sind, a presumption ought to be made in favour of the existence of a usage or custom where it is known that that usage or custom is prevalent. He bases this argument upon the words of the Regulation, which are as follows: "The law to be observed in the trial of suits shall be Acts of Parliament and Regulations of Government applicable to the case; in the absence of such Acts and Regulations, the usage of the country in which the suit arose; if none such appears, the law of the defendant; and in the absence of specific law and usage, justice, equity, and good conscience alone."

Their Lordships cannot accept this view. In a case of *Daya Ram* v. *Sohel Singh* (1), which related to proof of a Hindu custom, the Chief Court of the

(1) (1906) 41 Punj. Rec. 390, 393.

Punjab had to consider a similar question on the terms of section 5 of the Punjab Laws Act, the words of which are more strictly in favour of the appellant's contention than those of the Regulation that governs this dispute. This contention was dealt with by Mr. Justice Robertson at p. 410 of the report in words which their Lordships think so aptly and expressly declare the true relation of the necessity of proof as between customary and established law that they may with advantage be reproduced. The learned Judge said :—

"In all cases it appears to me under this Act, it lies upon the person asserting that he is ruled in regard to a particular matter by custom, to prove that he is so governed, and not by personal law, and further. to prove what the particular custom is. There is no presumption created by the clause in favour of custom; on the contrary, it is only when the custom is established that it is to be the rule of decision. The Legislature did not show itself enamoured of custom rather than law nor does it show any tendency to extend the 'principles' of custom to any matter to which a rule of custom is not clearly proved to apply. It is not the spirit of Customary Law, nor any theory of custom or deductions from other customs which is to be a rule of decision, but only 'any custom applicable to the parties concerned which is not . . . .'; and it therefore appears to me clear that when either party to a suit sets up 'custom' as a rule of decision, it lies upon him to prove the custom which he seeks to apply; if he fails to do so clause (b) of section 5 of the Punjab Laws Act applies, and the rule of decision must be the personal law of the parties subject to the other provisions of the clause."

The principle that underlies this statement is, in their Lordships' opinion, correct, and is applicable to

1917

ABDUL HUSSEIN KHAN v. SONA DERO.

the construction of the Regulation that governs the present case. It is therefore incumbent upon the plaintiff to allege and prove the custom on which he relies, and it becomes important to consider the nature and extent of the proof required. Their Lordships have carefully considered the difficulty of applying all the strict rules that govern the establishment of custom in this country to circumstances which find no analogy here. Custom binding inheritance in a particular family has long been recognised in India [see *Soorendro Nath Roy* v. *Heeramonee Burmoneah* (1)], although such a custom is unknown to the law of this country and is foreign to its spirits. Customs affecting descent in certain areas or customs affecting rights of inhabitants of a particular district are perhaps the nearest analogies in this country. But in England, if a custom were alleged as applicable to a particular district, and the evidence tendered in its support proved that the rights claimed had been enjoyed by people outside the district, the custom would fail. This principle, however, it seems to their Lordships, ought not to be applied in considering such a custom as the one claimed here, since, if the custom were in fact well established in one particular family, whether it were enjoyed or no by another family would not affect the question, since the custom might be independent in each case, and the evidence would not establish that the custom failed by reason of the inability to define the exact limits within which it was to be found when once it was established that, within certain and definite limits, it undoubtedly existed.

Nor are their Lordships prepared to accept without qualification the statement of Mr. Justice Crouch

(1) (1868) 12 Moo. I. A. 81, 91.

that it is necessary to reject as useless for proving the custom "all those instances where we have no evidence that the deceased left any estate at all, or where there is no evidence to show its nature or value, or the amount of liabilities against it, *e.g.*, whether or not it consisted merely of a *jagir*, or *mafi* land, or of heirlooms, or of land heavily mortgaged, or of the family demesne; where there is no proof and no admission that the lady said to have been excluded had a legal claim to a share under the ordinary law; where, in case of a married lady, we have no evidence showing the actual amount of dowry received; where, in case of unmarried ladies, there is no proof that they knew of the custom and stood aside in obedience to it. And in all those cases where a witness states that he has himself excluded his own sisters, or nieces, our judgment as to the value of such statement as evidence of the custom having been enforced must be held in suspense until there is also evidence before us that the ladies had independent advice, and, with full and intelligent knowledge of the custom, voluntarily acquiesced in their exclusion." An example of each of the conditions there laid down ought certainly to be established by some witness, but it is not, in their Lordships' opinion, necessary that all should be proved in every case, as this might greatly weaken the evidence by tradition to which in a custom of the character under the consideration great weight is due.

But, as pointed out by this Board in *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar* (1): "It is of the essence of special usages modifying the ordinary law of succession that they should be ancient

(1) (1872) 14 Moo. I. A. 570, 585.

1917

ABDUL HUSSEIN KHAN v. SONA DERO.

and invariable; and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends."

It is therefore necessary to define what is the custom, and then examine the evidence to see if it satisfies the conditions so laid down. It is urged against the appellant that he alleged the custom on which his case depends in three different forms: *first*, in the plaint filed on the 12th July, 1907, in which he asserted his rights as arising from current and immemorial custom of the dynasty of the parties; *secondly*, in an affidavit sworn by him on the 10th July, 1907, where he said that the custom was "that a woman after her marriage loses all interest and right of inheritance in the property left by her relations (on the father's side)"; and, *finally*, in the plaint in the present proceedings, where the custom is asserted in these terms: "But according to the custom regulating the inheritance by females in the family of the parties and amongst the respectable Baluchis and Sardars, which is ancient and which is invariable, and has been acted upon from time immemorial, and which has obtained amongst Sunnis or Shias alike, a woman is entitled to her proper dowry according to the rank or status of the family, and she has no other rights of inheritance to the property of her paternal relations."

There certainly is a marked difference between these different customs, but their Lordships are not prepared to give this fact such weight as to crush the appellant's case, and they will assume that the custom upon which he relies is a custom by which, in the

event of intestacy, daughters of the deceased are excluded in favour of their brothers, and sisters in favour of male paternal collaterals, and the question is, was such a custom proved?

A very large number of witnesses were called in its support, and a number of instances, amounting to sixty-one in all, were given as evidence of its operation. This evidence has been the subject of the most painstaking and careful analysis by both the Courts, and has again been carefully considered by their Lordships with the assistance of the criticisms made, both in the District Court and in the Court of Appeal. Upon the whole their Lordships think that this evidence fails to satisfy the necessary standard of proof and that upon this point the judgment of the Judicial Commissioner must be accepted. Their Lordships do not propose to examine again in detail each one of the instances mentioned, for there are one or two general observations which are, in their opinion, sufficient.

The custom alleged, in its form most limited and best suited to the plaintiff's case, is a custom confined to the Talpur Mirs, the descendants of one Kaku Khan. These descendants are now represented by eight different families, viz.: Sorabanis, Rustomanis, Bijranis, Shahdanis, Mahomedanis, Shahwanis, Jamanis and Manikanis, of which the deceased belonged to the Shahdanis. Relevant and material instances are to be extracted from the descent of these families. The attempt to extend the custom to the "respectable Baluchis and Sardars" broke down, and it would in their Lordship's opinion, under any circumstance, have been unsafe to assume a custom applicable to a group of people so vaguely defined as those covered by the definition of "respectable Baluchis and Sardars." Dealing, therefore, with the Talpur Mirs

1917

ABDUL HUSSEIN KHAN v. SONA DERO.

alone, their Lordships think the evidence is subject to the following comments :—

In the first place, many of the instances relate to descendants of a ruling family and depend upon the eldest son inheriting to the exclusion of his brothers and sisters. Although it is true that the sisters are excluded, yet it is plain that we have not in these cases reached the custom on which the plaintiff relies, because in a ruling family an over-riding custom has excluded all males as well as females in favour of the eldest male. Nine further cases relate to instances where the excluded daughters were unmarried and living with their brothers. These instances cannot be confidently relied upon. The position and relationship of the different members of the family must always be considered in determining whether claims are not met because the rights to which they relate do not exist or whether they are put on one side because, in the circumstances, there is no need that they should be asserted. This is pointed out in the case of *Mirabivi* v. *Vellayanna* (1) by Chief Justice Turner and Mr. Justice Hutchins. It is there stated at p. 465 :—

"It must be admitted that instances have been adduced in which the claims of daughters and sisters to a share have been ignored, or they have been allotted maintenance, though the cases mentioned by the Judge of a partition in the father's lifetime are not inconsistent with Mahomedan law. There are also cases in which married daughters have been treated as estranged from the family. But instances of this kind will be found to occur where there is no doubt that the family is governed by pure Mahomedan law. Indeed, in many parts of the country it is unusual for Mahomedan ladies to insist on their unquestioned

(1) (1885) I.L.R. 8 Mad. 464, 465.

rights. They will often prefer being maintained by their brothers to taking a separate share for themselves, and when they are married, the marriage expenses and presents are often, by express or implied agreement, taken as equivalent to the share which they could claim. Moreover, Mahomedan females are so much under the influence of their male relations, that the mere partition of the property among the males without reference to them cannot count for much."

And with this statement their Lordships are in entire agreement.

In certain other instances, and notably in 24, 35 and 45, there is no substantial evidence of property to be divided, and in the most recent cases of all, 52—60, there is only one witness who speaks in their support, although it is plain that there must have been others who could have spoken upon the matter. It ought not, of course, to be assumed that a custom fails because certain of the instances brought forward in its support may be referable to other causes than the custom relied upon; nor again because in certain respects some of the witnesses may be found untrustworthy.

But there is one outstanding circumstance in the present case which their Lordships think demands attention. Mir Rustom Khan is the admitted head of the Rustomanis. He is a man of position and authority, and he says in plain terms that "there is no such custom amongst our families by which daughters and sisters are excluded from inheritance. They get their share of inheritance according to Mahomedan Law."

He is supported by other witnesses, of whom the learned Trial Judge says that they are all witnesses of high position, and that there seems no special reason

1917

ABDUL HUSSEIN KHAN v. SONA DERO.

why they should combine to give false evidence on behalf of the defendants, although he adds that Mir Rustom Khan was not on good terms with the plaintiff, and inclined to exaggerate his evidence. But the learned Judge declines to accept the view that these important witnesses are committing perjury, and the statement which he thinks shows a tendency to bias in favour of the defence is a statement which may well have been misunderstood. Mir Rustom Khan was speaking of the religion of the deceased, and stated that whenever a Sunni entered his house he had it washed three times. As the servants were Sunnis the learned Judge thinks that this is a clear improbability. It appears to their Lordships quite possible that Mir Rustom Khan was only referring to people of a similar social standing to the deceased, who, it is not unreasonable to assume, would not pay the same attention to the religion of his servants that he might to the religion of his friends. But however this may be, Rustom Khan can have been under no misapprehension upon the question of this custom. If he did not know of it, it may be safe to say that it did not exist. If he did know of it, he could not have denied the knowledge without deliberate untruth, which there is no reason to impute to his evidence.

There is, however, one instance in connection with his testimony which does need some further consideration. Mir Validad Khan, who was the paternal uncle of Rustom Khan, died leaving three sons and six daughters. Mir Rustom Khan was asked to determine how the estate should be divided among the three sons and he made an award effecting this division. It is suggested that if no such custom as that alleged existed he must have known that he was making an improper division of the property. Their Lordships do not think this is the only and necessary inference.

He was never asked to determine the rights as between the brothers and the sisters, but merely how to divide the property among the brothers themselves, and it may well be that he assumed that arrangements had been made with the sisters which rendered it unnecessary for him to consider anything more than the actual point that he was called upon to determine. He also speaks to a matter, to which constant reference is made by the witnesses, and that is that the question of inheritance is decided in each family, either by a family-council or by the head of the family. This is an extremely probable explanation of many of the instances in the present case, and if it be accepted it destroys the custom, because the division made according to the wishes of the members of a family-council is certainly not the custom on which the plaintiff relies.

In every case of this kind, the burden of proof lies heavily upon the plaintiff, and though his evidence may consist of a number of striking instances in support of his case, it receives a severe blow when prominent members of the families concerned deny that the custom exists.

There is also another piece of evidence which is of considerable value: this is to be found in the Revenue Records which relate to the descent of the property of Mir Ghulam Ali Khan, who died leaving three widows, one sister, two daughters, and a brother; one of these Records, dated October, 1903, shows a clear division according to the Mahomedan Law, and not according to any such custom as is alleged. There are no other Revenue Records produced, and it is said that the reason of their non-production is that they do not assist the defendants' case. But their Lordships think the omission is serious. The best evidence associated with any such custom as that alleged

1917

ABDUL HUSSEIN KHAN v. SONA DERO.

would be found in connection with the division of land, and these records would at least have established the fact that land was left, its extent and character, and would, were it the fact, make clear the point which the evidence leaves uncertain, that, in the division of this property, the women were excluded.

The argument put forward by the defendant that, in many of the cited instances, the women said to have been excluded have been provided with dowries either in the lifetime of the owner of the estate, on the division of which they received no benefit, or after his death by a male relation, and that this was equivalent to, and must be taken as, a recognition of their right to share, is one to which their Lordships are unable to accede. It is quite possible that the husband of a wife who had been suitably dowered would not desire to claim rights of inheritance against those by whose generosity or at whose expense the dower had been provided, but this would not involve the conclusion that the right to share existed and had been satisfied by the dower.

Again, such an argument, though it might affect inheritance as between father and daughter, would not cover the present case, for, if a daughter had been dowered by her father, and this were treated as equivalent to an advancement of her share in his estate, this would not affect a claim like the present put forward by a woman to a share in her brother's estate by whom she had never been dowered at all.

The ground upon which their Lordships base their judgment does not include any such considerations; it is their opinion that, although there is much reason in history for the custom alleged, and some evidence by which it receives support, yet on the whole the evidence has fallen short of the standard to which it must attain in order to succeed in altering the

devolution of property according to Mahomedan Law to a devolution determined by a family custom, and they will accordingly humbly advise His Majesty that this appeal should be dismissed with costs.

1917

ABDUL HUSSEIN KHAN v. SONA DERO.

J. V. W. *Appeal dismissed.*

Solicitor for the appellant: *Edward Dalgado.*
Solicitors for the respondents: *Wontner & Sons.*

APPELLATE CIVIL.

Before Mookerjee and Walmsley JJ.

NOWRANG SINGH

v.

JANARDAN KISHOR LAL SINGH.*

1917

May 22

Ejectment—Lease, forfeiture of—Transfer of Property Act (IV of 1882), s. 111, cl. (g)—Breach of covenant—Determination of lease, overt act necessary for—Waiver.

Where the rights and obligations of the parties are regulated by s. 111, cl. (*g*) of the Transfer of Property Act, there is no determination of a lease by forfeiture immediately on breach of covenant, but such breach must be followed by an overt act on the part of the lessor before the tenancy can be deemed to have determined in the eye of the law.

Anandamoyee v. *Lakhi Chandra Mitra* (1), *Kadir Bakhsh* v. *Prag Narain* (2) followed.

Held, further, that the institution of a suit for ejectment cannot be rightly regarded as the requisite act to show the intention of the landlord to determine the lease within the meaning of s. 111, cl. (*g*). The forfeiture must be completed and the lease determined before the commencement of the action for ejectment.

Deo Nandan Pershad v. *Megha Mahton* (3) referred to.

* Appeal from Original Decree, No. 481 of 1914, against the decree of Ashutosh Ghose, Subordinate Judge of Burdwan, dated June 19, 1914.

(1) (1906) I. L. R. 33 Calc. 339; 3 C. L. J. 274.
(2) (1912) 9 All. L. J. 794.
(3) (1906) I. L. R. 34 Calc. 57, 63.

1917

NOWRANG SINGH v. JANARDAN KISHOR LAL SINGH.

APPEAL by Nowrang Singh, the defendant.

The facts briefly are these. The plaintiffs, who were minors under the Court of Wards, brought a suit through their manager, for arrears of rent, etc., in respect of a colliery, the lease of which the defendants obtained under a *kabuliat* dated the 28th September 1901, for a term of 59 years from the plaintiffs' predecessor in title. The plaintiffs' total claim amounted to a sum of Rs. 9,055-11-4½ and extended over a period of five years from 1313 B.S. to 1317 B.S. The plaintiffs also claimed to eject the defendants on the ground of forfeiture of lease for non-payment of rent by virtue of a clause in the lease to the following effect; "We will pay the whole amount of the rent, year by year, by the 30th of Chaitra. If by non-payment of rent, we keep a cowri or farthing thereof unpaid, you will have power in the beginning of the month of Bysack of the next following year to take khas possession of the whole land lying within the undermentioned boundaries, including the coal mine thereon made by us, by your own authority and settle the same with another tenant and realise the amount of arrears with interest from our properties, moveable and immoveable, standing in our own names, or *benami*, and from our persons."

The Court of first instance granted a decree to the plaintiffs both for rent and ejectment. From this decision the defendants appealed to the High Court.

Babu Bipin Behari Ghose and *Babu Govinda Chandra De Roy*, for the appellant.

Babu Ram Charan Mitra, for the respondents.

Cur. adv. vult.

MOOKERJEE AND WALMSLEY JJ. This is an appeal by the defendant in a suit for arrears of rent of a

colliery held by him under the plaintiffs on the basis of a lease, dated the 28th September, 1901. The plaintiffs seek to recover their dues in respect of the years 1313 to 1317 B. S. and pray for ejectment of the defendant on the ground that, according to the terms of the contract between the parties, the lease had been forfeited by non-payment of rent. The Subordinate Judge has decreed the suit. His decision has been assailed in this Court on two grounds, namely, *first*, that a larger sum has been allowed to the plaintiffs than what is really due to them; and, *secondly*, that, on the face of the plaint, the claim for ejectment cannot be sustained.

The first point is sought to be established in two ways, namely, *first*, that credit should have been allowed for a sum of Rs. 1,500; and, *secondly*, that abatement of rent should have been allowed in respect of seven instead of six bighas. There is no force in either of these contentions. Upon the facts found by the Subordinate Judge, it is plain that the sum of Rs. 1,500 paid by the defendant had been rightly appropriated by the plaintiffs in satisfaction of their dues for an earlier period. As regards the amount of abatement legitimately allowable, we see no reason to differ from the Subordinate Judge as to the quantity of land acquired by the Railway Company. In our opinion, the amount decreed by the Subordinate Judge is recoverable by the plaintiffs from the defendant.

The second point raises an important question of law and requires careful consideration. The lease contains the following clause:

"We will pay the whole amount of the rent, year by year, by the 30th of Chaitra. If by non-payment of rent, we keep a *cowri* thereof unpaid you will have power, in the beginning of the month of Bysack of

1917

NOWRANG SINGH v. JANARDAN KISHOR LAL SINGH.

the next following year, to take *khas* possession of the whole land lying within the undermentioned boundaries, including the coal mine thereon made by us, by your own authority, and settle the same with another tenant and realise the amount of arrears with interest from our properties, moveable and immoveable, standing in our own names or *benami* and from our persons."

The plaintiffs contend that as default was made in the payment of rent, the tenancy has been forfeited and they have become entitled to possession of the property demised. The Subordinate Judge has given effect to this contention. We are of opinion that his decision overlooks more than one elementary principle. In the first place, no decree for ejectment can be made for non-payment of the arrears of four years. It is well settled that if rent is claimed for two consecutive years, ejectment cannot be decreed on the ground of forfeiture incurred at the end of the first year, because the very fact that rent is claimed for the second year, shows conclusively that the forfeiture, if any, incurred at the end of the first year, has been waived by the landlord. Illustrations of this principle will be found in the cases of *Jogeshuri* v. *Mahomed* (1), *Sitanath* v. *Basudeb* (2), *Kalanand* v. *Gunput* (3), *Raj Mohan De* v. *Mati Lal Saha* (4). In the second place, a decree for ejectment cannot be made in this case, even on account of default of payment of rent of the fourth year, as, on the face of the plaint, there was no completed forfeiture of the tenancy at the date of the institution of the suit. The statutory provision on the subject is embodied in section 111, clause (*g*) of the Transfer of Property Act,

(1) (1886) I. L. R. 14 Calc. 33.
(2) (1900) 2 C. L. J. 540.
(3) (1911) 16 C. W. N. 104.
(4) (1915) 22 C. L. J. 546.

and, may, for the purposes of this case, be enunciated in the following terms: "a lease of immoveable property determines, by forfeiture, in case the lessee breaks an express condition which provides that on breach thereof the lessor may re-enter or the lease shall become void; and the *lessor or his transferee does some act showing his intention to determine the lease.*" This makes it plain that where the rights and obligations of the parties are regulated by section 111, cl. (*g*) of the Transfer of Property Act, there is no determination of a lease by forfeiture, immediately on breach of covenant, but the lessor is required to do some act thereafter, showing his intention to determine the lease; in other words, the breach must be followed by an overt act on the part of the lessor before the tenancy can be deemed to have determined in the eye of the law. This view was adopted by this Court in the case of *Anandamoyee* v. *Lakhi Chandra* (1), which was accepted as a correct exposition of the law in *Kadir Bakhsh* v. *Prag Narain* (2). The distinction, as regards the question of forfeiture, between cases governed by the Transfer of Property Act and by other statutes, has been repeatedly pointed out in Madras, where it has been surmised that the requirement of a further act is probably a relic of the antiquated technicality of the common law which required the formality of re-entry by the lessor of leased lands before the lease could be determined for breach of covenant: Warvelle on Ejectment, section 47: Newell on Ejectment, Chapter VIII, section 17; *Venkatramana* v. *Gundaraya* (3), *Padmanabhaya* v. *Ranga* (4), *Chengiah* v. *Damara* (5),

(1) (1906) I. L. R. 33 Calc. 339; 3 C. L. J. 274.
(2) (1912) 9 All. L. J. 794.
(3) (1908) I. L. R. 31 Mad. 403.
(4) (1910) I. L. R. 34 Mad. 161; 20 Mad. L. J. 930.
(5) (1912) 15 I. C. 445.

1917

NOWRANG SINGH v. JANARDAN KISHOR LAL SINGH.

Korapalu v. *Narayana* (1), *Ramkrishna* v. *Baburaya* (2), *Vidyapurna* v. *Rangappayya* (3), *Sivaram* v. *Alagappa Chetty* (4). The requirements of the Transfer of Property Act are perfectly plain, and its express provisions cannot be ignored or treated as surplusage, whatever may have been the history of the development of the law on the subject in England: *Goodright* v. *Cator* (5), *Evans* v. *Davis* (6), *Jones* v. *Carter* (7), *Fenn* v. *Smart* (8), *Baylis* v. *Le Gros* (9), *Roberts* v. *Davey* (10), *Serjeant* v. *Nash* (11), *Moore* v. *Ullcoats Co.* (12), *Grimwood* v. *Moss* (13). It is further obvious that the institution of the suit for ejectment cannot be rightly regarded as the requisite act to show the intention of the landlord to determine the lease within the meaning of section 111, clause (*g*). The forfeiture must be completed and the lease determined before the commencement of the action for ejectment for there must be a cause of action in existence antecedent to the suit: *Deo Nandan* v. *Meghu* (14). The act, however, need not be a formal notice to quit and may be a demand for possession, oral or written; what is essential is an overt act, which intimates to the tenant the intention of the landlord to determine the lease. In the case before us, the plaint does not even allege such an act on the part of the landlords. Consequently, there is no escape from the position that the plaint does not disclose any cause of action for the claim in ejectment.

(1) (1913) I. L. R. 38 Mad. 445; 25 Mad. L. J. 315.
(2) (1912) 23 Mad. L. J. 715.
(3) (1913) 25 Mad. L. J. 486.
(4) (1915) Mad. W. N. 845.
(5) (1780) 2 Doug. 477, 486.
(6) (1878) 10 Ch. D. 747; 763.
(7) (1846) 15 M. & W. 718.
(8) (1810) 12 East. 444.
(9) (1858) 4 C. B. N. S. 537.
(10) (1833) 4 B. & Ad. 664.
(11) [1903] 2 K. B. 304.
(12) [1908] 1 Ch. 575.
(13) (1872) L. R. 7 C. P. 360, 364.
(14) (1906) I. L. R. 34 Calc. 57, 63.

1917

NOWRANG SINGH v. JANARDAN KISHOR LAL SINGH.

The result is that this appeal is allowed in part and the decree, in so far as it entitles the plaintiffs to eject the defendant, is cancelled, but it will stand in all other respects. Each party will pay his own costs in this Court.

L. R. *Appeal allowed in part.*

APPELLATE CIVIL.

Before Mookerjee and Walmsley JJ.

1917

May 30.

SHIBNARAIN MOOKERJEE

v.

BHUTNATH GUCHAIT*

Custom—Uncertainty—Inundated lands—Remission of rent.

Where in a suit for rent, the tenants set up a custom of total remission of rent on the ground that a certain portion of the land was subject to inundation resulting in the destruction of crops, the extent of such destruction not being specific, and that crops were so destroyed during one of the years for which rent was claimed :

Held, that such custom was both unreasonable and uncertain and, consequently, unenforceable in law.

Tyson v. *Smith* (1), *Mahamaya Debi* v. *Haridas Haldar* (2), *Salisbury* v. *Gladstone* (3) referred to.

SECOND APPEAL by the plaintiff, Shibnarain Mookerjee.

The facts necessary for the purposes of this report are shortly these. The plaintiff who is the owner,

* Appeal from Appellate Decree, No. 2176 of 1915, against the decree of S. K. Ghose, District Judge of Hooghly, dated June 15, 1915, confirming the decree of Sarat Chandra Bose, Munsif of Hooghly, dated March 27, 1914.

(1) (1838) 9 A. & E. 406. (2) (1914) I. L. R. 42 Calc. 455.
(3) (1861) 9 H. L. C. 692, 701.

1917

SHIBNARAIN MOOKERJEE v. BHUTNATH GUCHAIT.

amongst other properties, of the disputed lands in the village of Kumdhara instituted, on the 19th April 1913, a suit for arrears of rent against the defendants, his tenants. The plaintiff alleged that the holdings in dispute comprised 25 bighas, 18 cottahs and 2 chattaks of land and the annual rent payable thereof was at the rate of Rs. 77-10. The defendants on the other hand did not dispute the actual area of the said lands nor the amount of the annual rent, but contended that the holdings in question comprised two classes of lands, namely, (i) 3 cottahs and 7 chattaks of *nihaja* land for which a rent of Re. 1 was payable, and (ii) 25 bighas, 14 cottahs and 11 chattaks of *hajabad* lands, rent payable being Rs. 76-10. The defendants relied upon a customary right to abatement of rent on account of the *hajabad* lands. They submitted that the *nihaja* lands were free from inundation and were always subject to payment of rent, while the *hajabad* lands being liable to inundation were exempt from payment of rent when the crops thereon were destroyed by inundation. The defendants alleged that this custom had prevailed in the plaintiff's estate as well as in adjacent estates from time immemorial and from generation to generation. They contended that as there was inundation during one of the four years for which rent was claimed they were entitled to reduction on the footing of customary right.

On the evidence, the Court of first instance found that the custom of *hajabad* existed at Kumdhara and that there was inundation in 1316 B. S. and accordingly held that the defendants were not liable to pay any rent for that year as to the *hajabad* lands. This was affirmed by the lower Appellate Court. The plaintiff thereupon appealed to the High Court.

Sir Rashbehary Ghose (with him *Babu Dwarkanath Chakravarty*, *Babu Surendra Nath Roy*, *Babu*

Surendra Chandra Sen, *Babu Biraj Mohan Majumdar* and *Babu Satyendra Nath Roy*), for the appellant, contended that the custom set up was unreasonable and uncertain. The custom as set up and as understood by both the Courts below was to the effect that whenever there was inundation the tenants were entitled to remission of rent irrespective of any destruction of crops. Again, were the tenants entitled to remission if a portion of their lands was inundated resulting in partial destruction? The custom set up, therefore, was vague and indefinite. There was nothing to show that it was compulsory.

Babu Krishna Kamal Maitra (with him *Babu Bipin Behary Ghose*), for the respondents, contended that the custom set up and as understood by the parties was to the effect that in the years of *haja*, or destruction of crops by inundation, the tenants were entitled to remission of rent. *Haja* in Wilson's Glossary meant destruction of crops and evidently it meant the total destruction of crops. That was what was understood by the parties and pleaded by the defendants. The plaintiff's evidence went to show that there was only partial destruction in those years in which, according to the defendants, there was total destruction of crops owing to inundation. From this it was clear what the custom set up and understood was, namely, the custom of remission of rent in case of total destruction of crops. If this was the custom set up, there was nothing unreasonable in it and it was also not indefinite. The defendants have proved that whenever there was *haja* or destruction of crops by inundation, the tenants were granted remission of rent, not as a matter of favour, but as a matter of right. Hence all the elements of a valid custom were present here.

Cur. adv. vult.

1917

SHIBNARAIN MOOKERJEE v. BHUTNATH GUCHAIT.

MOOKERJEE AND WALMSLEY JJ. This is an appeal by the plaintiff in a suit for recovery of arrears of rent. The case for the plaintiff is that rent is payable at the rate of Rs. 77-10 per annum for the disputed holding which comprises 25 bighas, 18 cottahs and 2 chattaks of land. The defendants allege that the area comprises two classes of land, namely, 3 cottahs and 7 chattaks of *nihaja* lands, for which a rent of Re. 1 is payable, and 25 bighas, 14 cottahs and 11 chattaks of *hajabad* lands, for which a rent of Rs. 76-10 is payable. It is thus clear that there is no dispute between the parties either as to the area or the annual rent payable in respect thereof. The defendants, however, set up a customary right to abatement of rent on account of the *hajabad* lands. They assert that the *nihaja* lands are free from inundation and are always subject to payment of rent, while the *hajabad* lands are liable to inundation and are exempt from payment of rent when the crops thereon are destroyed by inundation. They allege that this custom has prevailed in the estate of the plaintiff as also in adjacent estates from time immemorial and from generation to generation. The custom is formulated in the following terms in the written statement. "In the years of inundations, the zamindar never gets rent on account of *hajabad* portions, nor do the tenants pay them; in the years of inundations, the tenants only pay rents for the *nihaja* portions." The defendants assert that during one of the four years for which rent is claimed, there was inundation and they are entitled to reduction of rent, not as a matter of favour, but on the basis of customary right.

On these pleadings, the point arose for determination, "whether there is any custom in Mouza Kumdhara (where the defendants' lands are situate) of remitting

rent in the years in which there is *haja* or inundation." The Courts below have found on this question in favour of the defendants and have partially decreed the claim accordingly. On the present appeal, the decision of the District Judge has been assailed on the ground that the custom alleged is unreasonable and uncertain and that there is no evidence to show that it is compulsory on the landlord to allow abatement of rent on account of inundation.

It has not been disputed before us on behalf of the tenants that the alleged custom, in order that it may be deemed valid in law, must be proved to be reasonable and certain: *Tyson* v. *Smith* (1), *Mahamaya Debi* v. *Haridas Haldar* (2). The landlord appellant urges that the custom is unreasonable. As explained in the second of the two cases just mentioned, if the validity of a custom is challenged on the ground that it is against reason, the reason referred to is not to be understood as meaning every unlearned man's reason, but artificial and legal reason warranted by authority of law. Consequently, when it is said that "a custom is void because it is unreasonable," what is meant is that the unreasonable character of the alleged custom conclusively proves that the usage, even though it may have existed from time immemorial, must have resulted from accident or indulgence and not from any right conferred in ancient times: *Salisbury* v. *Gladstone* (3). It is obvious that a custom which is prejudicial to a class and is beneficial only to a particular individual is repugnant to the law of reason. On this principle, it has been ruled that a custom in a manor that the commoner cannot turn in his cattle until the lord has put in his own, is bad, for it is injurious to the multitude and beneficial only

(1) (1838) 9 A. & E. 406.
(2) (1914) I. L. R. 42 Calc. 455 ; 20 C. L. J. 183.
(3) (1861) 9 H. L. C. 692, 701.

1917

THE METROPOLITAN ENGINEERING WORKS v. DEBRUNNER.

between the parties about the car and subsequently, on 12th May 1917, the defendant wrote to the plaintiff company :—

"Nevertheless, I am willing to hand over the Mors car to you against a cheque for Rs. 3,12),—Rs. 3,000 being the cost of the car and Rs. 120 interest. As I intend advertising the car unless you wish to have it, please understand that my offer only holds good up to Wednesday next, as the time I have is limited."

On Wednesday, the 16th May, the plaintiff company tendered Rs. 3,120 in Government currency notes to the defendant and asked for delivery of the car in accordance with the offer contained in the letter of 12th May. The defendant refused the tender contending that his offer expired at midnight on Tuesday, May 15th, and that the phrase "up to Wednesday" was exclusive and not inclusive of Wednesday.

The company, thereupon, brought this suit to enforce the contract.

Mr. Langford James and *Mr. B. K. Ghosh*, for the plaintiff company.

Mr. R. C. Bonnerjee and *Mr. N. M. Chatterjee*, for the defendant.

Cur. adv. vult.

GREAVES J. The short point which arises for decision in this suit is the meaning of the words "up to Wednesday" contained in a letter dated the 12th May 1917 and addressed by the defendant to the plaintiff company, and whereby the defendant offered to sell to the plaintiff company his Mors car in these words: "Nevertheless, I am quite willing to hand over the Mors car to you against a cheque of Rs. 3,120,—Rs. 3,000 being the cost of the car and Rs. 120 interest. As I intend advertising the car unless you wish to have it, please understand that my offer only holds

good up to Wednesday next, as the time I have is limited." It is not disputed that the plaintiff company sometime on Wednesday, the 16th May, tendered Rs. 3,120 in Government currency notes to the defendant and asked for delivery of the car in accordance with the offer contained in the letter of the 12th May. The defendant, however, refused the tender contending that his offer expired at midnight on Tuesday, May 15th, and that the phrase "up to Wednesday" was exclusive and not inclusive of Wednesday. The defendant claimed to give evidence of his meaning and intention when he wrote the letter and of the sense in which the plaintiff company understood the offer, but I refused to admit this evidence having regard to section 91 of the Evidence Act. I have not been able to find, nor have counsel who appeared before me, any authority in which the meaning and effect of the word "up to" has been judicially considered; but counsel have referred me to various authorities in which the meaning of the word "until", which seems to me to be synonymous with "up to", has been considered and discussed. These authorities are collected in the late Mr. Stroud's "Judicial Dictionary", 2nd Edition, Vol. 3, P. 2142, under the heading "until", and it appears from *The King* v. *Stevens* (1) that the word "until" may be construed either as exclusive or inclusive of the day to which it is applied according to the context and subject matter.

It appears from the cases cited in Mr. Stroud's book that in a memorandum enlarging the time within which an award may be made, "until" will generally include the *whole* of the day named, that, where a defendant is given "till" a certain day to plead, judgment signed for want of a plea on that day was bad, as the defendant might have delivered a plea during such day.

(1) (1804) 5 East 244.

1917

THE METROPOLITAN ENGINEERING WORKS v. DEBRUNNER.

GREAVES J.

In *Bellhouse* v. *Mellor* (1), a bankrupt was granted protection until the 29th July from all process, and it was held that the protection extended to the whole of the 29th July. In *Isaacs* v. *Royal Insurance Co.* (2), goods were insured from the 14th February 1868 until the 14th August 1868, and it was held that under the terms of the policy the whole of the 14th August was protected.

In The Annual Practice for 1917, at p. 1202, in the notes to r. 1 of R. S. C., O. LIV, which deals with time under the heading "General Rule of Computation," these words occur:—"all periods of time under Rules of Court in the Supreme Court (including Bankruptcy) and in the County Court are so computed that the day "from" or "after" which the time is fixed is excluded from such computation, and the day on which the act is to be done or "until" which some act is prohibited or protection afforded, is included therein (Encyclopædia of the Laws of England 2nd Edition, tit. "Time") and see p. 1203 of the Annual Practice under the heading "Until". There is an Irish decision to the contrary effect in *Rogers* v. *Davis* (3), in which a plea of confession had been given with stay of execution until the 1st of May next and on that day execution was issued. The three Judges who formed the Court held that the writ was properly issued, Burton J. stating that the word "until" did not mean after.

Now, these authorities do not appear to me to be conclusive of the case, but I think they show a general tendency of inclusion rather than exclusion of the day up to or until which something is to be done; but of course the context and subject matter have to be taken into account in determining whether the word "up to" is to be taken as exclusive or inclusive of the day

(1) (1859) 4 H. & N. 116. (2) (1870) L. R. 5 Ex. 296.
(3) (1845) 8 Ir. L. R. 399.

to which it is applied. I cannot find anything in the context here which really assists in construing the words. It is true that the defendant states that his time is limited, but his anxiety on this score is not so much to limit the period during which the offer is to remain open, as to give him time to advertise the car, in the event of his offer not being accepted, that is to say, his dominating motive is, I should say, not so much to limit the duration of the offer as to have time to dispose of the car elsewhere if his offer is not accepted. The result is, that I have to fall back on the words themselves, and I think that the ordinary meaning which the ordinary person would attach to them is that the offer is to be open during the whole of Wednesday and does not expire at midnight on Tuesday. Having regard then, *first*, to what, I think, is the ordinary meaning of the words, *secondly*, to the manner in which similar expressions have ordinarily and generally been construed, and, *thirdly*, to the fact that I think the wellknown principle applicable to deeds, and I think to other documents that the documents should in case of doubt, and where all other rules of construction fail, be construed most strongly against the grantor [*see* Co. Litt. 183a] is applicable here. I am of opinion that upon the true construction of the letter and the words "up to Wednesday", the offer remained open until midnight on Wednesday. The car has, I understand, been sold, and accordingly, the defendant after deducting the sum of Rs. 3,120 from the sale proceeds (less the sum of Rs. 583-7-0 due from him to the plaintiff company for repairs to the car) and the commission on sale of the car, will pay over the balance to the plaintiff company. And the defendant must pay the plaintiff company's costs, to be taxed on scale No. 2.

N. G.

CRIMINAL REVISION.

Before Teunon and Richardson JJ.

1917

June 7

DEBENDRA NATH DAS GUPTA

v.

REGISTRAR OF JOINT STOCK COMPANIES.*

Company—Balance sheet of a company—Omission of director to call annual general meeting and to place before it a properly audited balance sheet—Liability of director for default in filing copy of the same—Indian Companies Act (VII of 1913), ss. 76, 131, 134—Jurisdiction.

The director of a company is liable, under s. 134 (*4*) of the Indian Companies Act (VII of 1913), for default in filing a copy of the annual balance sheet duly prepared and audited, in the office of the Registrar of Joint Stock Companies at Calcutta, and cannot plead, in answer to a charge under s. 134, his own omission to call the annual general meeting of the company required by s. 76, and to place before it such balance sheet.

Park v. *Lawton* (1) referred to.

The offence under s. 134 (*4*) is triable in Calcutta, whether or not, if the prosecution had been laid under s. 76 or 131 of the Act, the Presidency Magistrate might have had jurisdiction to try the offences committed under the latter sections.

IN 1892 the Darjeeling Press Co., Ltd., was formed and registered under the Indian Companies Act (VI of 1882) with a share capital of the nominal value of Rs. 10,000. The registered office of the company was in Darjeeling. In 1914 the petitioner was appointed one of its directors. The company met with losses and went into liquidation at the close of the year 1916.

It appeared that no annual general meeting of the shareholders had been held in 1915, as required by s. 76

* Criminal Revision No. 503 of 1917 against the order of K. B. Das Gupta, Fourth Presidency Magistrate, Calcutta, dated April 4, 1917.

(1) [1911] 1 K. B. 588.

of the Indian Companies Act, 1913, that the annual list of members of the company for the year ending 31st October 1915, and the summary prescribed by s. 32 of the Act had not been filed with the Registrar of Joint Stock Companies at Calcutta, though a list and summary made up to 31st March 1915 had been so filed on 2nd January 1916. It was also proved that the balance sheet for the year ending 31st March 1915, required under s. 131 of the Act, was not filed with the Registrar till the 11th December 1916.

On the 13th March 1917, two separate complaints under s 32(*4*), and s. 134(*4*), respectively, were laid against the petitioner before the Chief Presidency Magistrate who made over the cases to the Fourth Presidency Magistrate for trial. The petitioner was tried separately under these sections, and convicted and sentenced, on the 4th April 1917, in each case, to a fine of Rs. 30 and in default to 30 days' simple imprisonment. The petitioner thereupon moved the High Court and obtained two Rules on the 27th April.

Mr. I. B. Sen (with him *Babu Probodh Kumar Das*), for the petitioner. Until the prosecution proved that the preliminary stages had been gone through, viz., that a balance sheet was *actually* prepared, audited, and placed before the company at the general meeting, the offence under s. 134(*4*) of default in filing the same with the Registrar is not made out. The section requires the filing of a copy which was audited and laid before the company at a general meeting. No such meeting was held in 1915, and the balance sheet could not, therefore, be put up. The accused might have been charged, under ss. 76 and 131 of the Companies Act, with failure to hold a general meeting and to prepare and lay before it a properly audited balance sheet, but in such a case the offences would

1917

DEBENDRA NATH DAS GUPTA v. REGISTRAR OF JOINT STOCK COMPANIES.

have been triable in Darjeeling and not by a Presidency Magistrate in Calcutta.

The Offg. Deputy Legal Remembrancer (*Mr. J. Camell*), for the Crown. It was the duty of the directors, both under the articles of association and under the Common Law, to call a general meeting annually and to lay before it a properly audited balance sheet. He cannot plead his own omission to do so: *Park* v. *Lawton* (1). The offence charged, viz., the omission to file a copy of the balance sheet, was committed in Calcutta.

Mr. I. B. Sen, in reply. There was no evidence that the petitioner was in Darjeeling and a party to the omission to call a general meeting. Further, the English case was decided under s. 26 of the English Companies (Consolidation) Act, 1908, and is differently worded.

TEUNON AND RICHARDSON JJ. In this case it appears that the petitioner was one "of the directors of a Joint Stock Company known as the Darjeeling Press Company, Limited." He has been convicted under section 134(*4*) of the Indian Companies Act (VII of 1913) in respect of a default made in filing with the Registrar the balance sheet for the year 1914-15.

It is not disputed that as a matter of fact, in respect of the filing of the balance sheet with the Registrar of Companies a default was made, and the defence of the petitioner, as placed before us, is that in fact in that year there was no general meeting and that being so no balance sheet was laid before the company at any such general meeting. His contention then is that these preliminaries not having been fulfilled it was impossible for him or his company to comply with the requirements of section 134, and that he should have been convicted, if at all, not under section 134 but

under section 76 or 131. But it is not disputed, and in fact it is admitted, that as one of the directors the petitioner himself was responsible for insuring that all the necessary preliminaries to be observed prior to the filing of the balance sheet with the Registrar had been duly observed. That being so, on the principles laid down in the case of *Park* v. *Lawton* (1), we are of opinion that we ought to hold that it is not open to the petitioner to plead in answer to a charge under section 134 his prior default in respect of the calling of the prescribed general meeting and of placing before the company at such meeting a duly prepared and audited balance sheet.

The second contention on behalf of the petitioner is that, if he had been prosecuted under section 76 or section 131 of the Act, the Presidency Magistrate in Calcutta, before whom his conviction has been had, would have had no jurisdiction to try the offences charged under those sections, and that the jurisdiction would have lain exclusively with the Magistrates in Darjeeling. However that may be, that does not take away the jurisdiction which the Presidency Magistrates in Calcutta clearly possess in a charge under section 134: the office of the Registrar, with whom the balance sheet should be filed, being in fact in Calcutta. For these reasons we discharge this Rule.

E. H. M. *Rule discharged.*

(1) [1911] 1 K. B. 588.

CRIMINAL REVISION.

Before Teunon and Richardson JJ.

1917

June 7.

DEBENDRA NATH DAS GUPTA

v.

REGISTRAR OF JOINT STOCK COMPANIES.*

Company—Annual list of members, and summary—Omission of director to file same with Registrar—Liability of director under Indian Companies Act (VII of 1913), s. 32(4)—Place where default committed—Jurisdiction of Presidency Magistrate to try offence—Criminal Procedure Code (Act V of 1898), ss. 182, 531.

The director of a company is liable, under s. 32(4) of the Indian Companies Act (VII of 1913) for default in filing a copy of the annual list of members and the summary prescribed therein, in the office of the Registrar of Joint Stock Companies at Calcutta.

A Presidency Magistrate has jurisdiction to try such offence under s. 182 of the Criminal Procedure Code, and even if not, s. 531 cures the defect.

THE facts of the case are set out in *Criminal Revision No. 503 of 1917.*§

Mr. I. B. Sen (with *Babu Probodh Kumar Das*), for the petitioner. The offence charged was not "default in complying with the requirements" of s. 32 of the Companies Act, but knowingly and wilfully authorizing or permitting the default. Authorizing or permitting the default was an act or omission which took place at Darjeeling and not in Calcutta, and is triable only in the former place.

The Offg. Deputy Legal Remembrancer (*Mr. J. Camell*) for the Crown. The list and summary had to be filed in Calcutta and the default occurred here.

* Criminal Revision No. 504 of 1917 against the order of K. B. Dass Gupta, Fourth Presidency Magistrate, Calcutta, dated April 4, 1917.

§ See *ante* p. 486.

1917

DEBENDRA NATH DAS GUPTA v. REGISTRAR OF JOINT STOCK COMPANIES.

TEUNON AND RICHARDSON JJ. In this case the petitioner, a director of a Joint Stock Company, has been convicted under section 32(*4*) of the Indian Companies Act in respect of a default punishable under that section and sub-section. It is not disputed that the default in filing the list and summary with the Registrar of Joint Stock Companies took place in Calcutta. But it is contended that in knowingly and wilfully authorizing or in permitting the default anything done by the petitioner must have been done at Darjeeling, where he resides and where the office of the company is situated. Even if that be so, we are of opinion, having regard to the provisions of section 182 of the Criminal Procedure Code, that the offence with which the petitioner was charged and under which he has been convicted, was triable in Calcutta; and even if that were not so, the provisions of section 531 of the Code sufficiently meet the point that has been taken. We, therefore, discharge this Rule.

E. H. M. *Rule discharged.*

ORIGINAL CIVIL.

Before Greaves J.

1917

June 11

SOLOMON

v.

JYOTSNA GHOSAL.*

Examination on Commission—Purdanashin lady—Exemption—Code of Civil Procedure (Act V of 1908), ss. 132, 133—Costs.

Section 132 of the Code of Civil Procedure covers the case of a woman who, although she may have abandoned the protection of the *purda*, should not be compelled to give evidence in Court, having regard to the class and community to which she belongs.

APPLICATION.

This was an application by the defendant for the issue of a commission for the examination of himself and his mother. The facts of the case are immaterial for the purpose of this report. The only question was whether, in view of the social position of the defendant's mother, a commission should issue for her examination. It appeared that she was a Hindu lady of good position in society who had definitely abandoned the protection of the *purda*. It was alleged on behalf of the defendant, that although the lady may appear in public, according to the manners of the class and community to which she belonged, there was a great prejudice against her appearing in the witness-box in Court. The lady herself was unwilling to appear in Court to give evidence.

Mr. B. L. Mitter, for the petitioner, contended that section 132 of the Code of Civil Procedure was wide enough to cover the present case and relied on *Mohesh*

* Application in Original Civil Suit No. 831 of 1916.

Chunder Addy v. *Manick Lall Addy* (1) and *Chamatkar Mohiney Dabee* v. *Mohesh Chunder Bose* (2).

Mr. Buckland, for the opposite party. Section 132 of the Code should be construed as applying exclusively to *purdanashin* ladies. In both the cases cited such ladies were in question. In the present case the defendant's mother is not *purdanashin* and is not entitled to exemption.

GREAVES J. This is an application to examine on commission the defendant in the suit and the mother of the defendant. . . . . .

So far as the defendant's mother is concerned, it appears on the evidence that she is a lady who appears in public. The evidence that I have before me on her behalf consists of an affidavit of Jogendra Nath Banerjee, a clerk in the employ of the defendant's solicitors. He states "that the lady is an old Hindu lady belonging to a high family and according to the practices prevailing in the community a lady of her station in life does not appear in any Court of law, and the defendant apprehends that unless a commission is issued to examine her it will not be possible to have her evidence". The evidence on behalf of the plaintiff is contained in an affidavit of Sassoon Jacob Cohen, Manager of the estate of Mrs. Azeeza Joseph Solomon Joseph, deceased, which estate is represented by the plaintiff in this suit. He states in paragraph 6, that he is well acquainted with the lady and that she is not a *purdanashin* lady, on the other hand she is a cultured and educated lady of various accomplishments and freely appears in public and goes about in society and talks freely to Europeans and others face to face according to the manners and customs of European ladies. In paragraph 8, he states, that in

(1) (1899) I. L. R. 26 Calc. 650. (2) (1892) I. L. R. 26 Calc. 651 n.

1917

SOLOMON v. JYOTSNA GHOSAL.

GREAVES J.

October 1915 she came in an open carriage to their office at No. 6, Bentinck Street, and in paragraph 9, he states "that in December 1916 she personally called at the house of Mr. Satyendra Nath Sen, an attorney, in Indian Mirror Street and met the deponent and one of the plaintiffs, and talked to them in Mr. Sen's presence". Under these circumstances, I have got to decide whether I shall compel the lady to appear in Court to give her evidence. She does not fall within the provisions of section 133 of the Code of Civil Procedure, which, counsel for the plaintiff admits for the purposes of this application, extends as well to the wives of the persons named therein as to the persons themselves. Accordingly the only section which is applicable is section 132, which provides that women, who according to the customs and manners of the country ought not to be compelled to appear in public, shall be exempt from personal appearance in Court. On behalf of the plaintiff it is said that as the lady has taken advantage of such privileges as attach to the abandonment of the *purda* system, she is not now entitled to claim the privilege of exemption from appearing in the witness-box which is provided by section 132, and it is suggested that section 132 applies exclusively to *purdanashin* or *quasi-purdanashin* ladies, and that it was designed for persons who observe the *purda* system. On behalf of the defendant it is said that although she does appear in public to a considerable extent, yet according to the customs and manners of the class and community to which she belongs, she could not appear to give her evidence in the witness-box in Court. I do not think that the lady who, I am satisfied on the evidence, has abandoned entirely the protection of the *purda*, and who, upon the evidence before me, I cannot see has any intention of resuming it, ought to be compelled,

having regard to the feelings of her class, to appear in the witness-box, and I am not prepared to force her to do so, because, I think, that the Indian point of view, which I think should be respected, would be that although the lady has abandoned the *purda* for the purposes to which I have already referred, it would be something in the nature of an outrage if I were to compel her, having regard to her social position, to appear in the witness-box to give evidence in Court. Under these circumstances, I think it would be unfortunate if I am forced, which I do not think I am by the words of the section, to compel her to come to Court to give her evidence as I think that section 132 is wide enough to cover her case. I feel some considerable doubt whether, having regard to the position she has adopted, I ought not to make her pay the costs of the privilege which she claims. On the whole I think I ought not to do so having regard to the terms of the section and the reasons which I have already stated and which have induced me not to force her to come into the witness-box. The result will be that, so far as she is concerned, I grant the commission asked for and the costs of this commission will be costs in the cause. Mr. H K. Mitra, Barrister-at-Law, will be commissioner. The commission to be returnable a month after the issue of the writ.

Commission issued.

Attorneys for the petitioner: *Kar, Mehta & Co.*

Attorney for the opposite party: *O. C. Gangooly.*

J. C.

APPELLATE CIVIL.

Before N. R. Chatterjea and Richardson JJ.

1917

June 12.

NEMAI CHARAN DE

v.

SECRETARY OF STATE FOR INDIA.*

Public Demands—What is a proper notice—Onus of proper service—Public Demands Recovery Act (Beng. I of 1895), ss. 10, 31.

Service of notice under s. 10 of the Public Demands Recovery Act, 1895, must be effected in strict conformity with that section.

Where service of notice is effected by fixing it on the outer door of the judgment-debtor's house, the onus is clearly upon the defendant relying on the notice to show that there was proper service as required by law.

Rakhal Chandra Rai Chowdhuri v. *The Secretary of State for India* (1) and *Jogeswar Sahu* v. *Debi Prasad* (2) followed.

SECOND APPEAL by Nemai Charan De, the plaintiff.

This appeal arose out of a suit to set aside a certificate-sale on the grounds that there was no notice under section 10 of Act I (B. C.) of 1895, proclamation of sale, or bid at the sale, and that there was no proper sale. The Secretary of State for India in Council, the first defendant in the suit, filed a written statement and contended, *inter alia*, that the *jotes* in arrear were sold in public auction and purchased by him for 3 pies, as there was no bidder, that the certificate was just, and the notice under section 10 was duly and regularly served, that the sale notice and proclamation was duly

* Appeal from Appellate Decree, No. 1990 of 1915, against the decree of R. E. Jack, Additional District Judge of Chittagong, dated May 10, 1915, confirming the decree of Ram Chandra Banerjee, Munsif of Cox's Bazar dated Jan. 27, 1914.

(1) (1886) I. L.R. 12 Calc. 603. (2) (1907) 5 C. L. J. 555.

published, that there was no fraud or concealment, that the plaintiff was estopped to raise the question of illegality, irregularity or fraud, as he had applied for settlement of the *jotes* in question with him after the sale, and that the settlement with the other defendants could not be set aside. The Munsif held that the notice was duly and regularly served under section 10 of the Act and that no suit lay to set aside a sale for mere irregularity. The Munsif did not consider whether any adult male member of the family was or was not present on whom notice under section 10 of Act I of 1895 could be served, as the serving peon was bound to enquire at the start. On appeal, the Additional District Judge considered the question, but disposed it of by holding that it was too late for the plaintiff to raise the question in the suit, and that no such question being raised before the Collector, when the serving peon was alive and might have been questioned on the point, or witnesses might have been examined on the subject, the defendants were entitled to the presumption that the peon did what he was legally bound to do. As to the sale proclamation and irregularity in the sale itself, the Judge held that there was no evidence of suppression or irregularity, and pointed out that the appellant had made no such allegations in his petition before the Collector, or of irregularity in the lower Court either. As a result the appeal was dismissed.

The plaintiff, thereupon, preferred this appeal to the High Court.

Babu Mahendranath Roy (with him *Babu Khiteesh Chandra Sen*), for the appellant. The Public Demands Recovery Act is a summary procedure, and as such strict compliance with its provisions is necessary: *Rakhal Chandra Rai Chowdhuri* v. *The Secretary of State*

1917

NEMAI CHARAN DE v. SECRETARY OF STATE FOR INDIA.

for India in Council (1). That was a case under the Act of 1880. In the Act of 1880, though there was no provision similar to section 31 of the Act of 1895, the provision as regards notice found a place. As for cases under the Act of 1895, see *Ambica Prosad* v. *Gopal Buksh Das* (2), *Umed Ali Bhuyan* v. *Raj Laksmi Debya* (3) and the Full Bench case of *Purna Chandra Chatterjee* v. *Dinabandhu Mukerjee* (4). The whole sale is null and void. See also Civil Procedure Code, Order V, rr. 12 and 17; *Cohen* v. *Nursing Dass Auddy* (5), and *Kassim Ebrahim Saleji* v. *Johurmull Khemka* (6) which, though not directly in point, are useful.

The onus of proof is clearly on the Secretary of State for India.

[CHATTERJEA J. See *Baijnath Sahai* v. *Ramgut Singh* (7).]

I also rely on *Jogeswar Sahu* v. *Debi Prasad* (8).

The Senior Government Pleader (*Babu Ramcharan Mitra*), for the respondent No. 1. We are quite in the dark as to the true state of things. It may be, there were no adult male members in the family. This is a second appeal. The missing link in the evidence is whether there was such an adult member. We must not read the finding as one in the missing link.

No inadequacy of price was suggested before this.

The plaintiff should be non-suited.

The disputed *jotes* have been let out to others, viz., defendants Nos. 2 to 19, who have improved the lands.

Babu Mahendranath Roy, in reply. There is no finding. There is only a presumption on a rule of evidence.

(1) (1886) I. L. R. 12 Calc. 603.
(2) (1901) 1 C. L. J. 550.
(3) (1905) I. L. R. 33 Calc. 84.
(4) (1907) I. L. R. 34 Calc. 811.
(5) (1892) I. L. R. 19 Calc. 201.
(6) (1915) I. L. R. 43 Calc. 447.
(7) (1896) I. L. R. 23 Calc. 775.
(8) (1907) 5 C. L. J. 555.

CHATTERJEA AND RICHARDSON JJ. The plaintiff appellant brought the suit, out of which this appeal arises, for a declaration that the sale held on the 19th June, 1912, under the Public Demands Recovery Act was null and void and did not affect the plaintiff's title to the lands in suit. The plaintiff also prayed for confirmation of possession and for other reliefs.

The suit has been valued at Rs. 998 and the property was sold for 3 pies.

The sale has been attacked on the ground that no notice under section 10 of Beng. Act I of 1895 was served.

The learned District Judge says, "It is true that the peon's report of service of the notice under section 10, Act I of 1895, does not show that there was no adult male member of the family present on whom he could have served the notice as he was bound to do. The person is unfortunately dead, so that he could not be questioned on this point. Had it been alleged that an adult member of the family was there at the alleged date of service, the witnesses might have been questioned on the point or witnesses might have been examined on the subject, but when no such question was raised, I think the defendants are entitled to the presumption that the peon did what he was legally bound to do. Undoubtedly he went to the village and there seems to be no reason why he should not have made a regular service, since it is clear that the appellant knew of the sale."

We think that the learned Judge has taken an erroneous view as to the onus of proof in such cases. He seems to have been of opinion that it was for the plaintiff to show that there were male members of the family on whom the notice could be served. But as is pointed out in *Rakhal Chandra Rai Chowdhuri* v.

1917

NEMAI CHARAN DE v. SECRETARY OF STATE FOR INDIA.

The Secretary of State for India in Council (1), "it is sufficient for him to deny any such service so as to put upon the defendant the burden of proving that the proper service has been made."

The manner in which the notice under section 10 is to be served is laid down in section 31 of the Act; and it has been held in several cases that the service of notice under section 10 must be effected in strict conformity with that section. If no attempt is made to effect the service as contemplated by that section, it cannot be said that there was strict conformity with the provisions of the section. That section provides in the first place that there must be an attempt at personal service. It then provides that "when such judgment-debtor cannot be found, the service may be made on any adult male member of his family residing with him." The section then goes on to say: "If no such adult male member can be found, the notice may be served by fixing a copy on the outer door of the house in which the judgment-debtor ordinarily dwells or carries on business, or by fixing a copy thereof in some conspicuous place in the office of the certificate officer issuing the same and also in some conspicuous part of the land, if any, affected by the service of the notice."

As pointed out in *Jogeswar Sahu* v. *Debi Prasad* (2), "the service, therefore, in this manner, that is, by fixing the notice on the outer door of the judgment-debtor's house is not sufficient compliance with the law unless it is shown that an attempt was made to effect service on the adult male members of the family of the judgment-debtors." The onus, therefore, was clearly upon the defendant to show that there was proper service of the notice, as required by law.

(1) (1 86) I. L. R. 12 Calc. 603, 605. (2) (1907) 5 C. L. J. 555, 557.

The peon who made the service is, no doubt, dead; but his return is in evidence: and that return does not show that there was no adult male member of the family on whom he could serve the notice as he was bound to do. The learned District Judge was of opinion that there was a presumption depending upon a rule of evidence, namely, that it was for the plaintiff to show that there were male members of the family upon whom service could be made.

As we have said, the onus does not lie upon the plaintiff. The presumption relied upon by the learned Judge, therefore, does not arise. The defendant must prove proper service of the notice and, as part of that, he has to show that no adult male member of the family could be found upon whom notice could be served.

We are informed by the learned Government Pleader that there is some evidence, or admission on the point, to be considered. Under the circumstances, we think that there ought to be a decision on the point.

We accordingly set aside the decree of the lower Appellate Court and send the case back to that Court in order that the question may be considered and the case decided in accordance with the finding arrived at on the point.

Costs will abide the result.

S. M. *Case remanded.*

APPEAL FROM ORIGINAL CIVIL.

Before Sanderson C.J. and Woodroffe J.

1917

June 26.

CAMPBELL & Co.

v.

JESHRAJ GIRIDHARI LALL.*

Appeal—Arbitration—Award filed in Court—Application to set aside award—Arbitration Act (IX of 1899), s. 11 (2)—Civil Procedure Code (Act V of 1908), s. 104 (f)—Letters Patent, 1865, cl. 15.

No appeal lies under s. 104 (*f*) of the Civil Procedure Code from an order refusing to set aside an award made and filed under the provisions of the Arbitration Act.

S. 104 (*f*) of the Civil Procedure Code does not apply to proceedings under cl. (2) of s. 11 of the Arbitration Act.

The Court, however, has jurisdiction to hear the appeal under cl. 15 of the Letters Patent.

APPEAL by Messrs. Donald Campbell & Co., petitioners, from the judgment of Greaves J.

On the 2nd June, 1914, Messrs. Donald Campbell & Co. of London, entered into an agreement with Messrs. Jeshraj Giridhari Lall of Calcutta, relating to dealings in jute shipped by the latter to the former. In the months of June and July, 1914, various contracts for the sale of jute were entered into between the parties and in pursuance of these contracts about 774 bales of jute were shipped to Germany by the s.s. *Rappenfels* and about 681 bales of jute were shipped to the same country by the s.s. *Westmark*. In respect of the above shipments Messrs. Jeshraj Giridhari Lall drew on Messrs. Donald Campbell & Co. certain drafts under the provisions of the abovementioned agreement. Before the s.s. *Rappenfels* and the s.s. *Westmark* arrived at their destination war

* Appeal from Original Civil, No. 24 of 1917, in Suit No. 22 of 1916.

broke out between England and Germany. The s.s. *Rappenfels* was seized by the British Navy and sent to Colombo and the jute shipped by her under contract was subsequently returned to Calcutta and sold there. When the drafts in respect of this jute arrived in London, they were duly presented for acceptance to Messrs. Donald Campbell & Co., who, at first, refused them on the ground that the contracts were dissolved by the operation of law, but were ultimately induced to accept the drafts and pay for the same. Thereafter, Messrs. Donald Campbell & Co. submitted a claim to the Insurance Company for the amount due on the policies of insurance in respect of this jute and recovered the same from them.

In respect of the cargo of jute shipped by the s.s. *Westmark* the drafts were, under similar circumstances, accepted and paid by Messrs. Donald Campbell & Co. to Messrs. Jeshraj Giridhari Lall, but they stated that the claims against the Insurance Company were not met and that the jute shipped by that vessel ultimately arrived in a very damaged condition.

Disputes then arose between the parties with regard to the refund of the balance of the amount of the insurance money to Messrs. Jeshraj Giridhari Lall after deducting the amount of the drafts in connection with the jute shipped by the s.s. *Rappenfels* and with regard to Messrs. Donald Campbell & Co.'s claim for the amount of the jute shipped by the s.s. *Westmark*.

On the 8th May, 1916, one Mr. H. J. Borton, representative of Messrs. Donald Campbell & Co. in Calcutta, acting on an advice by cable from his firm in London, wrote to Messrs. Jeshraj Giridhari Lall giving them notice of arbitration to be held in London in respect of the jute shipments per s.s. *Rappenfels* and s.s. *Westmark* and of the

1917

CAMPBELL & Co. v. JESHRAJ GIRIDHARI LALL.

appointment of Mr. S. E. Nevill as arbitrator in London, and calling upon them to appoint an arbitrator whose name should be submitted to him in Calcutta within 7 days. This letter was subsequently confirmed by Messrs. Donald Campbell & Co., who wrote to Messrs. Jeshraj Giridhari Lall to the above effect and stated, that in default of receipt of the name of an arbitrator to act for Messrs. Jeshraj Giridhari Lall within the time specified in the contract, they would ask Mr. Nevill to act as sole arbitrator in conformity with clause 2 of the bye-laws of the London Jute Association.

On the 11th May, 1916, Messrs. Jeshraj Giridhari Lall replied to Mr. Borton stating that no claim had been framed against Messrs. Donald Campbell & Co. in respect of the shipment per s.s. *Westmark*. They notified to him that they claimed arbitration under the agreement of the 2nd June, 1914, and appointed Mr. F. M. Leslie to act as their arbitrator in Calcutta. They requested Messrs. Donald Campbell & Co. to appoint an arbitrator in Calcutta and, unless they received the arbitrator's name within 7 days from date, they would proceed under the Arbitration Act.

Messrs. Donald Campbell & Co. having failed to appoint an arbitrator in Calcutta within the specified time, Messrs. Jeshraj Giridhari Lall, on the 26th May, 1914, wrote to Messrs. Donald Campbell & Co. stating that the arbitration must proceed *ex parte* and that as Mr. Leslie was unwilling to act as the sole arbitrator, they appointed Mr. H. G. Pearson to be their arbitrator in his place. The arbitration accordingly proceeded in the absence of Messrs. Donald Campbell & Co. and on the 23rd June, 1916, the arbitrator made an award in favour of Messrs. Jeshraj Giridhari Lall for Rs. 25,602-4 and sent the same to the Registrar, who filed it the next day in the High Court.

1917

CAMPBELL & Co. v. JESHRAJ GIRIDHARI LALL.

On the 14th July, 1916, Messrs. Donald Campbell & Co. applied under the Arbitration Act for a Rule against Messrs. Jeshraj Giridhari Lall calling on them to show cause why the award should not be set aside, why in the alternative, and without prejudice to the petitioners, the said award should not be omitted, and why the defendants, their assignees and agents should not be restrained by an injunction of this Court from executing the said award pending the final determination of this application. In support of the Rule, the petitioners alleged that upon the terms of the agreement between the parties the arbitration should have been held in London, that under clause xii of the agreement between the parties notice of the appointment of an arbitrator by Messrs. Jeshraj Giridhari Lall should have been given to Messrs. Donald Campbell & Co. in London, that there was no dispute between the parties, that the arbitrator made his award without taking any evidence and without the dispute being defined, and that there was no valid notice under section 9 (*b*) of the Indian Arbitration Act. The Rule was heard by Mr. Justice Greaves, who decided against the petitioners in respect of all their contentions. The petitioners thereupon appealed.

Mr. B. Chakravarti (with him *Mr. P. L. Buckland*), for the respondents, took the preliminary objection that there was no right of appeal in this case. This was an arbitration under the Arbitration Act. The preamble, sections 4 and 6 and schedule I, clauses 3 and 8, section 20 and rule 10 of the Act were referred to. After an award was made and filed under this Act it became final and no appeal lay from the order of a Judge refusing to set aside the award. The object of the Act was to secure finality. It was a self-contained Act. It provided for a special jurisdiction to be exercised in Presidency towns and such interference,

1917

CAMPBELL & Co. v. JESHRAJ GIRIDHARI LALL.

as was contemplated, was in the Act itself: see sections 8, 9 and 11 to 16. The jurisdiction of the arbitrator was a special jurisdiction created by a special act for a special purpose. Such purpose would be defeated if any interference were allowed. When the award was filed the Court acted merely as a ministerial agency and not a judicial one. No suit or decree was necessary. The award by itself was enforceable as a decree: see *Baijnath* v. *Ahmed Musaji Saleji* (1), *Tribhuwandas Kalliandas Gajjar* v. *Jivanchand Lallubhai* (2) and *In re a Bankruptcy Notice* (3). The interference contemplated by the various sections of the Arbitration Act was not an interference in a suit. It was only interference to the extent for which provision was made. Neither the sections of the Act, nor the Rules, provided for an appeal. The present case did not fall under the provisions of the Civil Procedure Code and the provisions for appeal therein contained were not applicable to arbitrations under the Arbitration Act.

This was not a suit. Clause 15 of the Letters Patent did not apply and no appeal lay: see *Sandback Charity Trustees* v. *North Staffordshire Railway Co.* (4), at pages 3 and 4.

Mr. C. R Das (with him *Mr. A. N. Chaudhuri* and *Mr. R. N. Mitter*), for the appellants. There was a right of appeal either under s. 104 (*f*) of the Civil Procedure Code, or under clause 15 of the Letters Patent. Section 104 (*f*) applied to schedule II, sections 20 and 21 of the Code, as well as to the Arbitration Act. *Kettra Nath Gangopadhyay* v. *Ushabala Dasi* (5) was relied on Under the Arbitration Act as soon as an award was filed, it operated as a decree under the Civil Procedure Code, unless the Judge interposed in some way or

(1) (1912) I. L. R. 40 Calc. 219.
(2) (1910) I. L. R. 35 Bom. 196.
(3) [1907] I. K. B. 478.
(4) (1877) 3 Q. B. D 1.
(5) (1914) 18 C. W. N. 381.

another. Being a decree, it was appealable. Furthermore an order refusing to set aside an award fixed a liability on the appellants. It was a judgment within clause 15 of the Letters Patent and, as such, appealable: see *Budhu Lal* v. *Chattu Gope* (1), *Toolsee Money Dassee* v. *Sudevi Dassee* (2), *In re Arbitration Act* (3), *Sashti Charan Chatterjee* v. *Tarak Chandra Chatterjee* (4), *Mahomed Wahiduddin* v. *Hakiman* (5) and *Janokey Nath Guha* v. *Brojo Lal Guha* (6).

Mr. Chakravarti, in reply. Arbitrations in suits or under the Civil Procedure Code stood on an entirely different footing to arbitrations under the Arbitration Act. *In re Arbitration Act* (3) had no application to the present case.

SANDERSON C. J. In this case a preliminary point has been taken that there is no right of appeal.

An application was made before Mr. Justice Greaves by the present appellants, and they obtained a Rule calling upon the opposite party to show cause why the award made in these matters should not be taken off the file and set aside, or why, in the alternative and without prejudice to the petitioners, the said award should not be remitted, and why an injunction should not be awarded against the opposite party restraining them and their assignees, servants and agents, until the further order of this Court, from executing the said award.

As I understand, the award had been made against the petitioners, and it had been sent by the arbitrator to the Registrar, who, in accordance with the Rules, filed it. I ought to have said that the arbitration was under the Indian Arbitration Act, 1899, which applies

(1) (1916) I. L. R. 44 Calc. 804; 21 C. W. N. 269.
(2) (1899) I. L. R. 26 Calc. 361.
(3) (1908) I. L. R. 34 Bom. 1.
(4) (1871) 8 B. L. R. 315.
(5) (1898) I. L. R. 25 Calc. 757.
(6) (1906) I. L. R. 33 Calc. 757.

1917

CAMPBELL & Co. v. JESHRAJ GIRIDHARI LALL.

SANDERSON C. J.

to the Presidency Towns, and so to Calcutta. The Rule which applies is Rule 12 of Chapter XXIII of the Original Side Rules, which is as follows :—"Where the arbitrators or umpire have been requested to file the award, they shall cause the award or a signed copy thereof to be filed in Court in accordance with section 11 (*2*) of the Act, by forwarding the same (together with the necessary court-fees for filing), under a sealed cover addressed to the Registrar, with a letter requesting that the award be filed." That, as appears from the Rule, is done in pursuance of the provisions of section 11, clause (*2*), of the Indian Arbitration Act; and, that clause provides, "the arbitrators or umpire shall, at the request of any party to the submission or any person claiming under him, and upon payment of the fees and charges due in respect of the arbitration and award, and of the costs and charges of filing the award, cause the award, or a signed copy of it, to be filed in the Court; and notice of the filing shall be given to the parties by the arbitrators or umpire."

The learned counsel for the appellant has argued that there is a right of appeal either under the section 104 (*f*) of the Civil Procedure Code or under section 15 of the Letters Patent.

I do not agree with the learned counsel that there is a right of appeal under section 104 (*f*) in this case; that section provides that "an appeal shall lie from the following orders.

. . . . . .

"(*f*) An order filing or refusing to file an award in an arbitration without the intervention of the Court."

I do not think that clause (*f*) of section 104 applies to the filing of an award under clause (*2*) of section 11 of the Arbitration Act, because an award under the latter clause can be filed in Court, and is in practice

filed in Court without the intervention of an order by a Judge. In my opinion, clause (*f*) of section 104 obviously refers to proceedings under section 20 and perhaps other sections of the second schedule of the Code of Civil Procedure, when the arbitration proceedings are under the second schedule of the Code. Then if the party, under section 20, wants to get the award filed, he has to apply to the Court, and an order of the Judge is required, and the Judge would make an order directing that the award should be filed or that the award should not be filed as the case might be. Section 104 (*f*), therefore, would apply to such proceedings, and I do not think, as already stated, the section would apply to proceedings under clause (*2*) of section 11 of the Arbitration Act, under which an award can be filed without the order of a Judge.

But I am clearly of opinion that we have jurisdiction to hear the appeal under clause 15 of the Letters Patent, and, I think that there is no doubt that the order of Mr. Justice Greaves in this case, whereby he refused to take the award off the file, was a judgment within the meaning of clause 15 of the Letters Patent. In a material sense, it finally decided the rights of the parties, because, by refusing to take the award off the file, the learned Judge in effect made the appellant liable for the amount of the award, for, if the award is put upon the file and remains upon the file, then, as pointed out by the learned counsel for the appellant, it is enforceable as if it were a decree of the Court under section 15 of the Arbitration Act.

For these reasons, I think, that an appeal lies.

WOODROFFE J. I agree.

O. M.

Attorneys for the appellants : *G. N. Dutt & Co.*
Attorneys for the respondents : *Leslie & Hinds.*

PRIVY COUNCIL.

P.C.*
1917

Oct. 19.

SAUDAGAR SINGH

v.

PARDIP NARAYAN SINGH

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Declaratory Decree—Execution by Hindu widow, in possession of her husband's estate, of deed purporting to confer absolute interest in property to one reversioner to the exclusion of others—Right of excluded reversioners to declaration that the deed is not binding on them—Specific Relief Act (I of 1877), s. 42, ill. (e).

Where a Hindu widow (defendant 1), in possession of her husband's estate, had executed a deed purporting to confer the absolute interest in the property on one of the reversioners (defendant 3) to the exclusion of others who claimed to be also reversionary heirs (plaintiffs) :—

Held, that under section 42, illustration (*e*) of the Specific Relief Act (I of 1877) the plaintiffs who as heirs ranked equally with defendant 3 were entitled to a declaration that the deed was not binding on them, notwithstanding that they may never get any title because events may preclude them from doing so, and though such a declaration involves a finding that the plaintiffs are reversionary heirs.

Janaki Ammal v. *Narayanasami Aiyer* (1) distinguished.

APPEAL 98 of 1916 from a judgment and decree (29th January 1914) of the High Court at Calcutta, which reversed a judgment and decree (16th February 1909) of the Court of the Subordinate Judge of Patna.

Defendant No. 3 was the appellant to His Majesty in Council.

* *Present*: LORD PARKER OF WADDINGTON, LORD WRENBURY, SIR JOHN EDGE, MR. AMEER ALI AND SIR LAWRENCE JENKINS.

(1) (1916) I. L. R. 39 Mad. 634 ; L. R. 43 I. A. 207.

The facts are sufficiently stated in the judgment of the High Court (H. L. STEPHEN and B. K. MULLICK JJ.) which was as follows :—

"The facts of the case are that four brothers, Mahipat, Saligram, Het Narayan and Drigpal were at one time joint owners of family property. Saligram died, and was succeeded by his son Deo Narayan, and the family property was then partitioned and the uncles and nephew became separate. Deo Narayan then died leaving a widow Jaibasi and a daughter, Sakalbati. The plaintiffs are the sons of Drigpal and claim to be at present the reversionary heirs of Deo Narayan after the deaths of his widow and daughter, together with Saudagar, the childless son of Mahipat. In 1906 Jaibasi and Sakalbati executed a deed of tamliknama in favour of Saudagar; and the defendants now ask for a declaration that the deed is void as against the plaintiffs. They originally asked for possession, on the ground, as we understand it, that Jaibasi and Sakalbati have divested themselves of a right to possession and had not conferred it on Saudagar; but in this Court the ground taken is that though they may have given Saudagar a right to possession during their lives, the plaintiffs have a right to a declaration that the deed is not operative as against them. The pleadings are so framed as to include this case, and the real point that has been argued before us is that such a declaration should not be made in this case.

"Before considering this point, however, we must notice a defence on the fact that was raised in the Court below, and that has been raised again here, though it has not been much pressed. This is that Mahipat, the father of Saudagar, and Saligram, the father of Deo Narayan, were the sons of one mother, and that Het Narayan and Drigpal were the sons of another mother, and that consequently Saudagar is the reversionary heir to Deo Narayan to the exclusion of the plaintiffs. The lower Court has not decided this issue because he has held that the plaintiffs have no cause of action, but he has expressed an opinion that the four brothers were brothers of the whole blood. On considering the evidence in the case, we have no hesitation in adopting the same view, and we hold that the brothers were all borne by the same mother.

"This brings us to the real point at issue, as to which the plaintiffs' contention is that a reversioner on a limited estate is entitled to a declaration that a deed is invalid if its invalidity depends on facts which may be obscured by lapse of time, and that the invalidity or otherwise of the tamliknama depends on the question—whether the brothers were sons of the same mother or not, which can be more easily settled now than later. He relies on the decision of Phear J., in *Behary Lall Mohurwar* v. *Madho*

1917

SAUDAGAR SINGH v. PARDIP NARAYAN SINGH.

Lall Shirgyawal (1), and on Illustration (*e*) of section 42 of the Specific Relief Act as authority for this proposition. The respondent on the other hand contends that while the proposition of law put forward by the appellant is unimpeachable, it does not apply to the facts of the present case; for what the plaintiffs seek is a decleration that they are now reversionary heirs by reason of being related to the defendants' branch of the family by whole and not by half blood, and the Court will not make a declaration to establish heirship before the succession in regard to which it is claimed has opened out, a proposition for the truth of which he refers us to *Kattama Natchiar* v. *Dorasinga Tevar* (2), if authority be needed. Neither side disputes the law as propounded by the other: and the simple question we have to decide is what is the declaration that is sought for in this case. As to this we have no doubt that the plaintiffs are asking among other things to have the tamliknama declared inoperative as against themselves, and the fact that such a declaration must be founded on reasons that would support a declaration that they are heirs to Deo Narayan, were it open to us to make such a declaration, cannot shut him out of his right to a declaration as to the validity of the document in question. This fact has been overlooked by the Court below where the case was argued with much greater complexity of issues than we have had to deal with. The appeal is accordingly allowed, the judgment and decree of the lower Court are set aside, the suit is decreed in favour of the plaintiffs, and it is declared that the deed in question is inoperative against them.

On this appeal,

Sir H. Erle Richards, K.C., and *A. M. Dunne, K.C.*, for the appellant, contended that such a declaration as the High Court had given the plaintiffs should never have been made; it was not supported by the practice prevailing in India. Reference was made to *Janaki Ammal* v. *Narayanasami Aiyer* (3), which was relied upon as governing the present case. The plaintiffs had no cause of action in this suit; they had not established any right as reversioners, and were not entitled to a declaration which would imply that they have the status of reversionary heirs. Mayne's Hindu law, 8th ed., paragraphs 647, 648, 651 was

(1) (1874) 13 B. L. R. 222; 21 W. R. 430.

(2) (1875) 15 B. L. R. 83; L. R. 2 I. A. 169.

(3) (1916) I. L. R. 39 Mad. 634; L. R. 43 I. A. 207.

referred to. The decree of the Subordinate Judge was right, and should be restored.

DeGruyther, K.C., and *J. M. Parikh*, for the respondents 1 and 2, were not called upon.

Oct. 19.

The judgment of their Lordships was delivered by LORD PARKER OF WADDINGTON. Their Lordships do not consider it necessary to call upon counsel for the respondents in this appeal.

The question is a very short one. It appears that the High Court from which the appeal has been brought has made a certain declaration. There is absolutely no ground for saying that that declaration is in any way erroneous, nor has counsel for the appellant suggested any error. The point is simply whether, under the practice prevalent in India, such a declaration ought to have been made. In order to show that no declaration ought to have been made, reference has been made to various cases, and in particular to the case of *Janaki Ammal v. Narayanasami Aiyer* (1). The point of that case is this : There was a Hindu widow entitled to an estate, and a suit was brought by a person, presumptively entitled as heir after her death, to prevent waste. It was held that there was no waste at all, and the question arose whether, under those circumstances, it was proper to give the persons presumptively entitled a declaration of their title as presumptive, or as sometimes called reversionary, heirs, and it was held by this Board that no such declaration ought to be made. It is said that this case is analogous to that, and that no declaration ought to have been made. On the other hand, if section 42 of the Specific Relief Act, 1877, is referred to, it will be seen that one of the illustrations given is this

(1) (1916) I. L. R. 39 Mad. 634 ; L. R. 43 I. A 207.

1917

SAUDAGAR SINGH v. PARDIP NARAYAN SINGH.

"The widow of a sonless Hindu alienates part of the property of which she is in possession as such. The person presumptively entitled to possess the property if he survive her, may, in a suit against the alienee, obtain a declaration that the alienation was made without legal necessity and was therefore void beyond on the widow's lifetime."

It appears to their Lordships to be clear on this section that where any deed is executed, the result of which may be to prejudice the interests of the reversionary heirs, those heirs, though still reversionary and though they may never get any title because events may preclude them from doing so, may have a declaration as to the effect of the deed. The declaration here is simply confined to that. It is a declaration that a certain deed which was executed by the Hindu widow in possession, and purporting to confer the absolute estate in the property on one of the reversionary heirs, is not binding on the other reversionary heirs. It was intended that this deed should operate to confer the whole interest on the grantee, on the footing that the other reversionary heirs, being of the half blood only, could not come in in competition with the grantee, and the real question in the suit, as far as their Lordships can make out, was simply whether the claimants were claimants of the half blood or of the whole blood, and it was decided by both Courts that they were not of the half blood, but of the whole blood.

Under these circumtances, it appears to their Lordships that this is an exact illustration of that which section 42 of the Specific Relief Act was meant to provide for. It is quite true that it involves a finding that the plaintiffs in this case are reversionary heirs, but that must always be the case where a declaration is made following the illustration (*e*) of

1917

SAUDAGAR SINGH v. PARDIP NARAYAN SINGH

the section, because it is only in virtue of the persons claiming the declaration being reversionary heirs, and therefore presumptively entitled, that the declaration is made.

Under these circumstances, their Lordships can see no possible ground for interfering with the decree of the High Court, and the appeal therefore should be dismissed with costs. Their Lordships will tender their humble advice to His Majesty accordingly.

Appeal dismissed.

Solicitors for the appellant : *T. L. Wilson & Co.*

Solicitors for the respondent : *Edward Dalgado.*

J. V. W.

APPELLATE CIVIL.

Before Mookerjee and Walmsley JJ.

SHIB CHANDRA BANERJEE

v.

SURENDRA CHANDRA MANDAL.*

1917

May 3.

Chaukidari Chakaran Lands—Effect of transfer—Village Chaukidari Act (Beng. VI of 1870), s. 51.

Where certain chaukidari chakaran lands forming part of a revenue-paying estate, being abandoned by the chaukidars, were appropriated by the zemindar who settled the same with the defendants as tenants, and thereafter the lands were resumed under the provisions of the Village Chaukidari Act, 1870, and subsequently transferred to the zemindar who granted an under-tenure to the plaintiff,

* Appeal from Appellate Decree, No. 112 of 1915, against the decree of Asutosh Ghose, Subordinate Judge of Burdwan, dated Nov. 18, 1914, reversing the decree of Peary Mohan Chatterjee, Munsif of Katwa, dated Dec. 3, 1913.

1917

SHIB CHANDRA BANERJEE v. SURENDRA CHANDRA MANDAL.

Held, that the plaintiff could not contend that the defendants who were brought on the land by his grantor were trespassers and the plaintiff's suit in ejectment must fail.

Ranjit Singh Bahadur v. Kali Dasi Debi (1) referred to.

SECOND appeal by the plaintiff, Shib Chandra Banerjee.

The facts necessary for the purposes of this report are shortly these. The lands in suit were originally chaukidari chakaran lands, situate in mauza Baramdanga within the Murshidabad Collectorate, and forming part of a revenue-paying estate. On the chaukidars vacating the lands, the zemindar dealt with them as part of his estate and settled the same with the defendants as his tenants. On the 21st January, 1909, the Government resumed these lands which were duly transferred to the zemindar in accordance with the provisions of the Village Chaukidari Act, 1870. The plaintiff obtained a permanent under-tenure from the zemindar on the 23rd December, 1911, and on the 3rd October, 1912, sued to eject the defendants on the ground that they were trespassers, unlawfully in occupation of the disputed lands. On the 3rd December, 1913, the Court of first instance decreed the suit and on the 18th November, 1914, the lower Appellate Court reversed that decision The plaintiff, thereupon, preferred this second appeal to the High Court.

Babu Ram Chandra Majumdar, for the appellant.

Babu Jogesh Chandra Roy and *Babu Haradhan Chatterjee*, for the respondents.

MOOKERJEE AND WALMSLEY JJ. This is an appeal by the plaintiff in a suit for recovery of possession of lands on declaration of title. The lands were originally chaukidari chakaran lands included in a revenue-paying estate situated within the jurisdiction of the

(1) (1917) 21 C. W. N. 609.

Collector of Murshidabad. The chaukidars who were in occupation disappeared many years ago. The zemindar thereupon appropriated the lands, dealt with them as included in his estate, and settled them with the defendants as tenants. The Subordinate Judge has found that the defendants have been in occupation for many years as tenants under the proprietor. On the 21st January, 1909, the lands were resumed by the Government, and, on the day following, they were transferred to the zemindar in accordance with the provisions of the Village Chaukidari Act, 1870. On the 23rd December, 1911, the plaintiff obtained a permanent under-tenure from the zemindar and, on the 3rd October, 1912, he instituted this suit for ejectment of the defendants on the ground that they were trespassers, unlawfully in occupation of the disputed lands. The Court of first instance decreed the suit. Upon appeal that decision has been reversed by the Subordinate Judge. In this Court, the decision of the lower Appellate Court has been attacked on the ground that, on the facts found, the zemindar had no authority to settle the lands with the defendants before they had been resumed and transferred to him under the provisions of the Village Chaukidari Act, and that the defendants must consequently be treated as trespassers. In our opinion, there is no foundation for this contention.

The decision of the Judicial Committee in the case of *Ranjit Singh* v. *Kali Dasi Debi* (1) leaves no room for doubt that these chaukidari chakaran lands formed part of the revenue-paying estate and that the zemindar had a qualified title therein. Consequently, when the lands were resumed under the Village Chaukidari Act and were transferred to the zemindar in accordance with its provisions, the estate taken by the zemindar

(1) (1917) 21 C. W. N. 609.

1917

SHIB CHANDRA BANERJEE v. SURENDRA CHANDRA MANDAL.

was in confirmation and by way of continuance of his existing estate. It is thus impossible to maintain the proposition that when the land vacated by a chaukidar passed into the possession of the zemindar, the latter became a trespasser. The zemindar, no doubt, incurred a liability to pay additional revenue to the Government in respect of this land. The amount of such revenue was determined by an appropriate proceeding under the Village Chaukidari Act when the lands were resumed and transferred to the zemindar. But, as explained by the Judicial Committee, the zemindar had a subsisting interest in the land, and the new estate vested in him was merely in continuation and confirmation of that pre-existing interest. What, then, is the true position? The chaukidars vacated the lands; the grantor of the plaintiff thereupon took possession of those lands and allowed the defendants to occupy the lands as his tenants, possibly on the erroneous assumption that they formed *mal* lands of his zemindari; subsequently a transfer was effected in his favour under the provisions of the Village Chaukidari Act. The plaintiff is clearly not competent to contend that the defendants, who were brought upon the lands as tenants by his grantor, are trespassers. An argument has been based on section 51 of the Village Chaukidari Act, to the effect that the section applies only to cases where there has been a contract by the zemindar in respect of lands other than chaukidari chakaran lands. In our opinion, there is no foundation for this limited construction of section 51. The object of section 51 is to maintain the validity of contracts made in respect of chaukidari chakaran lands, and it is immaterial whether such contracts do or do not also include other lands which are in no way affected by the resumption proceedings. We hold accordingly that the Subordinate Judge has

1917

SHIB CHANDRA BANERJEE v. SURENDRA CHANDRA MANDAL.

taken a correct view of the relative rights of the parties and that the suit has been properly dismissed. It is not necessary for us to determine the precise status of the defendants as tenants under the plaintiff: for it is a sufficient answer to the claim for ejectment that the defendants are not trespassers but tenants. The decree of the Subordinate Judge is accordingly affirmed and this appeal dismissed with costs.

L. R. *Appeal dismissed.*

CIVIL RULE.

Before Mookerjee and Walmsley JJ.

KANAI LAL GHOSE

v.

JATINDRA NATH CHANDRA.*

1917

May 15.

Possessory Suit—Specific Relief Act (I of 1877), s. 9—Second appeal—Civil Procedure Code (Act V of 1908), s. 102—Review.

Where in a suit under s. 9 of the Specific Relief Act, judgment was purported to be passed against five defendants but the decree was drawn up against one defendant only who alone contested the suit, and the decree-holder applied for execution against all the defendants, the Court dismissed the application on the ground that the decree was against one defendant only; on appeal the District Judge allowed execution to proceed against all the defendants, but on a subsequent application for review he discharged his original order on the ground of jurisdiction under s. 9 of the Specific Relief Act:

Held, that an application in execution proceedings was included in the term "suit" in s. 9 of the Specific Relief Act, and an appeal to the District Judge from an order of the Court of first instance was incompetent and the application for review equally so.

*Civil Rule, No. 82 of 1917, against the order of G. N. Ray, District Judge of Burdwan, dated Aug. 28, 1916.

1917

KANAI LAL GHOSE v. JATINDRA NATH CHANDRA.

Thomas Souza v. *Gulam Moidin Beari* (1), *Moufuz Ali* v. *Birj Nand Kirat* (2), *Anund Chunder Roy* v. *Sidhy Gopal Misser* (3), *Gora Chand Misser* v. *Baykanto Narayan Singh* (4), *Din Dayal* v. *Patrakhan* (5), *Narayan Parmanand* v. *Nagindas Bhaidas* (6), *Mavula Ammal* v. *Mavula Maracoir* (7), *Shyama Charan Mitter* v. *Debendra Nath Mukerjee* (8), *Minakshi Naidu* v. *Subramaniya Sastri* (9), *Sasi Bhusan Mookerjee* v. *Radha Nath Bose* (10), and *Profulla Krishna Deb* v. *Nosibannesa Bibi* (11) referred to.

CIVIL RULE obtained by the plaintiff Kanai Lal Ghose, the petitioner.

The facts necessary for the purposes of this report are briefly these. The petitioner above named instituted a suit under s. 9 of the Specific Relief Act for the recovery of possession of the disputed properties against the opposite parties Out of five defendants the defendant No. 5 appeared and contested the suit. On the 13th July 1914, the Court of first instance passed judgment in favour of the plaintiff, the concluding portion whereof purported to be against all the five defendants. The decree, however, was drawn up against one defendant only. Thereafter the petitioner applied for execution of the decree against all the defendants, but the defendants 2, 3 and 4 filed an objection on the ground that they did not contest the suit. On the 4th August 1915, the learned Munsif allowed the said objection and dismissed the application as against the defendants 1 to 4. Thereafter the petitioner appealed and the lower Appellate Court, on the 13th March 1916, allowed the execution of the decree to proceed against all the defendants. Subsequently the defendants 1 to 4 applied to the lower

(1) (1902) I. L. R. 26 Mad. 438.
(2) (1915) P. L. R. 45.
(3) (1867) 8 W. R. 112.
(4) (1873) 12 B. L. R. 261.
(5) (1896) I. L. R. 18 All., 481.
(6) (1905) I. L. R. 30 Bom. 113.
(7) (1906) I. L. R. 30 Mad. 212.
(8) (1900) I. L. R. 27 Calc., 484.
(9) (1887) I. L. R 11 Mad 26; L. R. 14 I. A. 160.
(10) (1914) 20 C. L. J. 433, 439.
(11) (1916) 24 C. L. J. 331.

Appellate Court for review of its own order and, on the 28th August 1916, the Court allowed this application and dismissed the appeal holding that it had no jurisdiction to entertain the same.

From this order the petitioner moved the High Court and obtained the present Rule.

Babu Satindra Nath Mookerjee, for the petitioner.

Babu Lalit Mohan Banerjee, for the opposite party.

MOOKERJEE AND WALMSLEY JJ. We are invited in this Rule to set aside an order made in execution of a decree for costs in a suit under section 9 of the Specific Relief Act. The petitioner instituted the possessory suit against five defendants, one of whom contested the claim and appeared at the trial. The suit was ultimately decreed in favour of the plaintiff with costs and interest. The concluding portion of the judgment ran as if the suit was decreed against all the defendants. The decree, however, was framed as a decree against one defendant only, namely, the fifth defendant who had resisted the claim. The plaintiff decree-holder applied for execution and for recovery of the costs from all the defendants. The Court held that the decree was in essence against the fifth defendant alone and so dismissed the application for execution against the other defendants. The decree-holder thereupon appealed to the District Judge. He held that the decree, interpreted by the judgment, must be deemed a decree against all the defendants, and accordingly directed execution to proceed against all of them. Subsequently, some of the defendants other than the fifth defendant applied to the District Judge to review his judgment on the ground that he had no jurisdiction to entertain the appeal. The District Judge accepted this contention as well-founded and discharged his original order. The result was that the order of the

1917

KANAI LAL GHOSE v. JATINDRA NATH CHANDRA.

trial Court stood restored. The plaintiff then obtained the present Rule, which calls upon the defendants to show cause why the orders made by the Courts below should not be set aside and why such other order should not be passed as to this Court might seem fit and proper. Consequently, all the orders made by the Courts below are before us for consideration.

Section 9 of the Specific Relief Act provides as follows: "No appeal shall lie from any order or decree passed in any suit instituted under this section, nor shall any review of any such order or decree be allowed." The first question for determination is, whether the term "suit" includes an execution proceeding on the basis of the decree in the suit. In our opinion, the question must be answered in the affirmative. This view was taken in the case of *Thomas Souza* v. *Gulam Moidin Beari* (1) and was subsequently adopted by the Punjab Chief Court in the case of *Moufuz Ali* v. *Birj Nand Kirat* (2). Though we have not been able to trace any reported decision on the point in this Court, it is plain that the view taken by the Madras High Court is in conformity with a principle which has been repeatedly recognized and applied here. Section 102 of the Code of Civil Procedure provides that no second appeal shall lie "in any suit of the nature cognizable by Courts of Small Causes, when the amount or value of the subject matter of the original suit does not exceed five hundred rupees." This provision is a reproduction of section 585 of the Code of 1882 which replaced section 27 of Act XXIII of 1861. It was ruled by this Court in the case of *Anund Chunder Roy* v. *Sidhy Gopal Misser* (3) that the expression "suit" in section 27 of Act XXIII of 1861 included execution proceedings, and this view

(1) (1902) I. L. R. 26 Mad. 438. (2) (1915) P. L. R. 45.
(3) (1867) 8 W. R. 112.

was subsequently affirmed by a Full Bench in the case of *Gora Chand Misser* v. *Baykanto Nath Singh* (1). A similar view has been adopted in all the other High Courts: *Din Dayal* v. *Patrakhan* (2), *Narayan Parmanand* v. *Nagindas Bhaidas* (3) and *Ammul* v. *Maracoir* (4). When a similar question arose before this Court in connection with section 153 of the Bengal Tenancy Act, it was ruled in the case of *Shyama Charan Mitter* v. *Debendra Nath Mukerjee* (5), that the bar provided in that section was applicable, not merely to the decree made in the suit, but extended to orders made in execution of such decree. This position was recently approved by a Special Bench of seven Judges in *Prafulla* v. *Nosibannessa* (6). We are consequently of opinion that the appeal to the District Judge was incompetent. The fact that no objection was taken to his jurisdiction when the appeal was heard, did not invest him with authority to entertain the appeal; for, as ruled by the Judicial Committee in *Minakshi Naidu* v. *Subramaniya* (7), where there is an inherent incompetency in a Court, no consent can confer upon the Court that jurisdiction which it does not possess. It is equally clear that the District Judge was not competent to entertain the application for review; because the order he had initially made was an order of the description mentioned in the concluding paragraph of section 9; so that if the appeal to him was incompetent, as we hold it was, the application for review was equally incompetent. It cannot further be maintained that as the District Judge had exercised a jurisdiction which was not vested in him by law, he had inherent power to set matters right

(1) (1873) 12 B. L. R. 261.
(2) (1896) I. L. R. 18 All. 481.
(3) (1905) I. L. R. 30 Bom. 113.
(4) (1906) I. L. R. 30 Mad. 212.
(5) (1900) I. L. R. 27 Calc. 484.
(6) (1916) 24 C. L. J. 331.
(7) (1887) I. L. R. 11 Mad. 26; L. R. 14 I. A. 160.

1917

KANAI LAL GHOSE v. JATINDRA NATH CHANDRA.

by way of review; for, as was explained in *Sasi Bhusan Mookerjee* v. *Radha Nath Bose* (1), it would be a patent misapplication by a Court of section 151 of the Code of Civil Procedure if it were, in the exercise of its inherent power, to assume jurisdiction by way of review where it was expressly forbidden by the Legislature to entertain such an application. The position thus is that the appeal was heard by the District Judge without jurisdiction, and the review was granted by him equally without jurisdiction, and both these orders must consequently be discharged. This leaves us with the order of the Court of first instance and the only question for consideration is, whether that order is of such a character as to justify an interference by this Court. We are not satisfied that the order was erroneous on the merits. We have examined the decree as also the judgment, and our inclination is to hold that the view taken by the Munsif was correct on the merits. But even if it were regarded as erroneous, the error which the Munsif committed would be nothing more than an error of law, due to a misconstruction of the decree; such an error does not constitute a sufficient ground for our interference in the exercise of our revisional jurisdiction.

The result is that this Rule is discharged, but each party will pay his own costs.

L. R. *Rule discharged.*

(1) (1914) 20 C. L. J. 433, 439.

MATRIMONIAL JURISDICTION.

Before Fletcher J.

COX *v.* COX.*

1910

June 3.

Divorce—Co-respondent, absence of—Leave of Judge for dispensing with co-respondent, when to be obtained—Jurisdiction of Court, in case of want of such leave—Matrimonial Causes Act of 1857 (20 & 21 Vict. c. 85) s. 28—Divorce Court Rules (English) 4, 5 and 6—Indian Divorce Act (IV of 1869), ss. 7, 11.

Where the husband was petitioner for divorce but could not name the alleged co-respondents, (the Master having issued citations), and at the hearing the petitioner applied for leave to dispense with the co-respondents :

Held, that the direction for such leave must be by application to the Judge on motion founded on affidavit *before the hearing* of the petition.

Held, further, that the Court had no jurisdiction to entertain the petition where such leave had not been obtained.

PETITION for divorce by Charles Walter George Cox.

The petitioner, who was an assistant in the firm of Messrs. Jessop & Co. and resided at No. 49-5, Bentinck Street, Calcutta, presented his petition on the Original Side of the High Court, for dissolution of his marriage with the respondent, Emily Florence Cox (*née* Lambert) of No. 24, Tangra Road, Entally. As the petitioner could not ascertain the names of the two co-respondents they were not named in the petition. The Master issued citations. No application, however, was made to the Judge for leave to dispense with the co-respondents. The following letter was filed with the petition :—" Calcutta, 31st January 1910. My dear George. This is to tell you that your ill-treatment to me has entirely killed my love for you, and in a weak

* Matrimonial Suit No. 3 of 1910.

1910

Cox
v.
Cox.

moment I committed adultery with a man who sympathises with me, but whose name I will not give up. I can under no circumstances live with you as your wife again. Your unfaithful wife, Emily Cox." The petition further stated that the respondent asked the petitioner to forgive her, but as he refused she occupied a separate room in petitioner's house till the 3rd February 1910 when she left. The petitioner's servant is said to have seen a man on three occasions in respondent's room. The parties had been married by the Senior Marriage Registrar at his house, No. 2, Park Lane, Calcutta, on 21st October 1909, and had last resided together at No. 49-5, Bentinck Street, Calcutta. On 3rd May 1910, Mr. A. C. Banerji, counsel, applied on behalf of the respondent for leave to appear and defend saying he was prepared to put in an affidavit stating that the respondent's letter admitting her guilt had been obtained by coercion whereas she had not committed adultery. The following order was made by Fletcher J. "I will let her appear and file warrant. Answer must be filed in 2 days. Case to appear on the list a fortnight to-day subject to part-heard and commercial cases. Costs reserved."

Mr. A. N. Chaudhuri (with him *Mr. P. C. Mitter*), for the petitioner, read the petition and the answer, and submitted that the other side's affidavit was not sworn when they applied for leave to defend and file answer.

[FLETCHER J. Have you obtained leave to proceed without a co-respondent? See s. 11 of the Divorce Act.]

I ask leave now to proceed without a co-respondent and pray for an adjournment to consider my position.

[FLETCHER J. I am afraid I must dismiss the petition. See Brown and Watts on Divorce, 8th Edition,

p. 285, and section 28 of the Matrimonial Causes Act of 1857, which is as follows:—" Upon any such petition presented by a husband, the petitioner shall make the alleged adulterer a co-respondent to the petition, unless on special grounds, to be allowed by the Court, he shall be excused from so doing; and on every petition presented by a wife for dissolution of marriage, the Court, if it see fit, may direct that the person with whom the husband is alleged to have committed adultery be made a co-respondent, and the parties or either of them may insist on having the contested matters of fact tried by a Jury, as hereinafter mentioned."]

Mr. P. C. Mitter (following on behalf of the petitioner). I submit that no order should be made as to costs because the question as to leave was not raised by the other side and was practically waived. Leave was not necessary for the purpose of giving jurisdiction but of procedure only: on the analogy of Order II, rule 4, the Court can grant leave now.

Mr. Avetoom and *Mr. A. C. Banerji*, for the respondent, were not called upon.

FLETCHER J. This is a petition presented to the Court by C. W. G. Cox for the dissolution of his marriage with the respondent E. F. Cox on the ground of adultery. To this petition there is no co-respondent. The adultery alleged in the petition is said to be proved by the admission contained in a letter, dated the 31st January, written by the respondent and addressed to the petitioner, in which it is said that she admitted that in a weak moment she had committed adultery with a man who sympathises with her but whose name she will not give up. The other case of adultery alleged is in the month of December when it is said the respondent on three occasions was visited

1910

Cox
v.
Cox.

FLETCHER J.

in the petitioner's house by a man whose name the petitioner has been unable to discover. Now the petition was presented to the Court and the Master directed citations to issue to the respondent. In my opinion, he was wholly wrong in doing that. However that may be, the jurisdiction is a special jurisdiction vested in the Court by the Indian Divorce Act to enable it to grant divorces in respect of persons professing the Christian religion and resident in India. The Act is chiefly modelled on the Matrimonial Causes Act of 1857. Section 7 is the first material section, being placed under the heading "Jurisdiction" and it says:—"Subject to the provisions contained in this Act, the High Court and District Courts shall, in all suits and proceedings hereunder, act and give relief on principles and rules which, in the opinion of the said Courts are, as nearly as may be, conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief." The other section that is material in this case, and which is substantially taken from section 28 of the Matrimonial Causes Act of 1857, is section 11 which enacts:—"Upon any such petition presented by a husband, the petitioner shall make the alleged adulterer a co-respondent to the said petition unless he is excused from so doing on one of the following grounds, to be allowed by the Court:—(i) that the respondent is leading the life of a prostitute, and that the petitioner knows of no person with whom the adultery has been committed; (ii) that the name of the alleged adulterer is unknown to the petitioner, although he has made due efforts to discover it; (iii) that the alleged adulterer is dead." Now the rules in England which govern this application are rules 4, 5 and 6 of the Divorce Court Rules. First rule 4 provides "Upon a husband

filing a petition for dissolution of marriage on the ground of adultery, the alleged adulterers shall be made co-respondents in the cause, unless the Judge Ordinary shall otherwise direct." Rule 5 says "Application for such direction is to be made to the Judge Ordinary on motion founded on affidavit." That it must be by affidavit shows obviously that the direction must be by application to the Judge on motion founded on affidavit before the hearing of the petition. Then rule 6 applies to the case where the address of the adulterer is unknown to the petitioner. It is obvious in this case that the direction ought to have been applied for on motion to the Judge supported by an affidavit and the affidavit ought to be sufficient to satisfy the Court that the petitioner after having made reasonable endeavours has been unable to find the name of the co-respondent. It seems to me to be a matter of grave public importance that a person should not be allowed to proceed in a Court for the dissolution of his marriage without having observed all the safeguards imposed by the law to prevent the chance of connivance or collusion. In my opinion, the Master ought not to have issued the citation when the petition contained no co-respondent, unless the Judge had granted leave to the petitioner to proceed without a co-respondent. In my opinion, the Court has no jurisdiction to entertain the petition and that, therefore, the petition must be dismissed with costs to the respondent.

G. S. *Petition dismissed.*

Attorney for the petitioner: *G. C. Moses.*

Attorneys for the respondent: *Orr, Dignam & Co.*

APPELLATE CIVIL.

Before Beachcroft and Walmsley JJ.

1917

June 22.

GOBINDA CHANDRA PAL

v.

KAILAS CHANDRA PAL*.

Execution of Decree—Mortgage bond—Money-decree— Civil Procedure Code (Act V of 1908), O. XXXIV, rr. 14, 15—Declaration of lien over properties—Such properties cannot be sold in execution—Decree-holder's remedy.

Where a decree is a decree against the judgment-debtor personally with a declaration in the decree that the decree-holders are entitled to a lien over the properties—a mortgage decree having been expressly refused by the decreeing Court—the decree is merely a money-decree with a declaration of lien over the properties. Rules 14 and 15 of O. XXXIV stand in the way of properties being sold in execution of such a decree. The decree-holder's only course is to institute a suit for sale in enforcement of the mortgage.

Mungul Pershad Dichit v. *Grija Kant Lahiri* (1) distinguished.

APPEAL by Gobinda Chandra Pal and others, the decree-holders.

This appeal arises out of a proceeding taken in execution of a decree dated the 25th April, 1907, on a security bond executed by the judgment-debtor in favour of one Krishna Chandra Pal, the predecessor in interest of the decree-holders stipulating that Krishna Chandra would supply goods to the judgment-debtor Kailas Pal to the extent of Rs. 25,000 on the security of 37 properties mentioned in the security. On the day the security bond was executed, Kailas Pal and his

*Appeal from Order, No. 76 of 1917, against the order of Sukumar Bhattacharji, Subordinate Judge of Dacca, dated Feb. 22, 1917.

(1) (1881) I. L. R. 8 Calc. 51.

wife executed a mortgage bond in favour of the said Krishna Pal by which 37 properties, mentioned in the security bond, belonging to Kailas and some other properties belonging to his wife, were mortgaged.

Decrees were obtained on both the instruments, the decree on the mortgage is of 1908. In execution of the mortgage-decree the decree-holders purchased some of the mortgaged properties—the last purchase was in 1912.

On the 11th of December, 1912, the decree-holders applied for execution of the decree on the security bond. The judgment-debtor contended, *inter alia*, that the decree-holders having purchased nine of the properties in execution of their mortgage-decree which are covered by the security bond the execution could not proceed for the whole amount without a rateable contribution in respect of the debt under the security decree from the said nine properties. This contention was given effect to, and it was held that the 9 properties purchased by the mortgage decree-holders should rateably contribute to the debt under the decree of the security bond, and it was ordered that all the 37 properties should be valued by a commissioner who should ascertain their present value, their value at the time of the security bond and at the time of the sale of the 9 properties. Against this order the decree-holders appealed to the High Court and the High Court held that the valuation at the date of the security bond should be taken and the properties of the security decree could not be sold because of the provisions of O. XXXIV, r. 14 read with r. 15 of the Code of Civil Procedure, and the High Court directed that the case "be remitted to the Court below with the direction that present application for execution be dismissed". There was a review of that order at the instance of the decree-holders and the Court directed

1917

GOBINDA CHANDRA PAL v. KAILAS CHANDRA PAL.

that as no cross-appeal had been filed, the direction that the application for execution of the decree-holders be dismissed, be struck out and that in other respects the decree dismissing the appeal would stand with the remark "we express no opinion on any question which may arise as to any proceedings in execution which the appellants may think fit to take." The decree-holders, then, applied to the Subordinate Judge of Dacca, for an order in the presence of the judgment-debtor that O. XXXIV, rr. 14 and 15 had no application to their execution case. And this application was made on the ground that if the said objection be raised and given effect to after commissioner carries out the directions given to him, the commissioner's cost would be needlessly thrown away. The judgment-debtor contended that the decree-holder's application for execution was not maintainable under O. XXXIV, rr. 14 and 15 of the Code of Civil Procedure and that the decree-holders could not sell the properties charged by the decree on the security-bond except under a decree as mentioned in r. 15 of the said Order. The Subordinate Judge allowed the objection and dismissed the application for execution. Hence the appeal by the decree-holders.

Babu Provash Chandra Mitter and *Babu Tarkeshwar Pal Chowdhury*, for the appellants.

Dr. Sarat Chandra Basak, for the respondents.

Cur. adv. vult.

BEACHCROFT J. This is an appeal from an order of the Subordinate Judge of Dacca dismissing the appellants' application for execution.

On the 18th April 1899, the respondent executed a mortgage bond in favour of the predecessor of the appellants, and on the same day executed a security bond in his favour. The security bond covered 37

properties which were included in the mortgage bond. In due course decrees were obtained on both bonds. In the decree made in the suit on the security bond on the 25th April, 1907, the following words are important, "this suit be decreed *ex parte*, that the defendant do pay to the plaintiffs the aforesaid Rs. 55,000 claimed and Rs. 1,852 the costs of this suit, plaintiffs' lien to the properties mentioned in the security bond is declared, but the plaintiffs cannot get a decree for sale of the said properties mentioned in the security bond as properties mortgaged, and that the plaintiffs' prayer to the above effect is rejected." The decree therefore was a money-decree with a declaration of plaintiffs' lien on the properties.

In execution of his decree on the mortgage bond, the decree-holder purchased nine of the properties covered by both bonds. We have not been told whether the mortgage decree has been satisfied or not, it is immaterial to the present appeal, but apparently it had not at the date of the present application for execution.

A sum of Rs. 11-2 only had been recovered on the decree on the security bond prior to the present application for execution, which was filed on the 11th December, 1912. In the application the amount due was shown to be Rs. 85,353-10-6 and there was a request for an order for attachment and sale of the properties. The Court ordered attachment of the properties returnable on the 8th February, 1913, and on that date ordered notice for settlement of sale proclamation. On the 22nd February, the judgment-debtor appeared and asked for time to file objection and time was given till the 1st March. In the meantime, on the 24th February, on the application of the decree-holder, issue of sale proclamation was ordered on the valuation given by the decree-holder, the 9th

1917

GOBINDA CHANDRA PAL v. KAILAS CHANDRA PAL.

BEACHCROFT J.

April being fixed as the date for sale. On the 1st March the judgment-debtor filed his objections. There was, as is usual, an allegation that the application for execution was illegal and not maintainable, but the main objection seems to have been as to the valuation of the properties. This petition of objection was supplemented by another on the 23rd June, in which the judgment-debtor urged that the application could not be entertained as the mortgagee could never sell the equity of redemption—an objection apparently based on the repealed section 99 of the Transfer of Property Act,—and that as some of the properties covered by the bond had already been sold in execution of the mortgage decree there should be a rateable distribution of the debt over all the properties.

The last mentioned point was apparently the only point pressed when the objections came to be decided, at least it is the only point touched on in the order of the Subordinate Judge made on the 21st February, 1914.

This order was followed by the appointment of a commissioner to value the properties. The matter then came to this Court on appeal by the decree-holders, on the 19th January, 1916. A Division Bench held that in view of the provisions of Order XXXIV, r. 14 the execution could not proceed, and dismissed the application for execution. There was an application for review and on the 19th December last, the Court held that as no cross-appeal had been filed the application for execution should not have been dismissed. The appeal was dismissed, with this reservation, "we express no opinion on any question which may arise as to any proceedings in execution which the appellants may think fit to take."

When the case went back to the Subordinate Judge, the decree-holder applied for an order in the presence of the judgment-debtor that Order XXXIV, rules 14

and 15 had no application. The Subordinate Judge upheld the contention of the judgment-debtor that those rules did apply and dismissed the application for execution. The present appeal is against that decision.

Four grounds are urged: (*i*) that it was no longer open to the judgment-debtor to object to the execution because the order for sale having been passed and not appealed against, it was binding on the parties even though it may have been erroneous; (*ii*) that rules 14 and 15 of Order XXXIV do not apply, because rule 15 applies only to the charges specified in section 100 of the Transfer of Property Act, and in this case the charge being created by judicial order was not such a charge; (*iii*) that the charge being created by the judicial order, rule 14 of Order XXXIV in terms had no application because the decree-holder was not a charge-holder before he got his decree; (*iv*) that the decree-holder had applied for and got an order for sale, therefore the objection came too late, as under rule 14 the objection must be taken before the property is brought to sale.

The first point taken is that the matter is *res judicata* and the case of *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (1) is cited to support the contention. In my opinion the similarity between the present case and the case cited is of the most shadowy character. It is true that the judgment-debtor when his petition of objection was heard did not argue the question of validity of the proceedings nor raise the question by way of appeal or cross-appeal on the decree-holders' appeal, but there the similarity ends. In the case cited the judgment-debtor was served with a notice under section 216 of the Code of Civil Procedure. The Court had to decide whether execution was barred

(1) (1881) I. L. R. 8 Calc. 51.

1917

GOBINDA CHANDRA PAL v. KAILAS CHANDRA PAL.

BEACHCROFT J.

and by its order for proceedings to continue impliedly decided that it was not. In the present case the order for attachment was made as a matter of routine on the application for execution. Similarly, the order for issue of sale proclamation was made in the absence of the judgment-debtor, though he had appeared in the proceedings. The question of the validity of the execution proceedings was not at any stage dealt with and decided though raised, possibly because it was not argued. In fact there is not in terms any order for sale or deciding that execution could be enforced by sale, there are only the routine order of attachment and the orders which would follow as a matter of course for settlement of the sale proclamation and for the issue of the proclamation. These cannot, in my opinion, be treated as impliedly deciding that execution could proceed by way of sale, as it is obvious the Subordinate Judge never considered the question. And when these facts were pointed out to the learned pleader for the appellant he urged that the judgment-debtor having acquiesced in the order and accepted the benefits of orders subsequently passed could not be allowed to question the original order, in other words a plea of estoppel. I do not think the decree-holder can raise a plea of estoppel when he must have known that he had himself induced the Court *ex parte* to pass an order to which he was not entitled.

Not only do the principles of *res judicata* and estoppel not stand in the way of the judgment-debtor's plea, but it would be a startling result if a decree-holder should be able in execution proceedings to get a relief which his decree expressly declares that he shall not have. It is true that what he asked for in his suit and what was refused was a mortgage sale, while his application in execution was for attachment and sale under Order XXI, but the

practical result is the same. The decree in effect said that he could not have a sale of the property without a suit under section 67 of the Transfer of Property Act and he is seeking to avoid the effect of that decree by an order in execution.

The next argument addressed to us was that rules 14 and 15 of Order XXXIV did not apply to this case, as the decree-holder's charge was not one within the meaning of section 100 of the Transfer of Property Act, in that it had not been created either by operation of law or by act of parties, but by judicial order, viz., the decree in the suit. The fallacy in this argument is that the charge is not created by the decree. The decree only declares the existence of the charge, it was in fact created by the act of parties. And the same answer applies to the argument based on the opening words of Order XXXIV, rule 14 read with rule 15, namely, that the decree-holder was not a charge-holder at the time that he obtained his decree. In fact he was, though his rights had not previous to the decree obtained judicial recognition.

The fourth ground depends on the view that the words "bring the property to sale" in Order XXXIV, rule 14, mean nothing more than obtain an order for sale. In my opinion they include not only all the steps preliminary to the sale, but the sale itself. In fact the view urged on behalf of the appellants would be impossible of application, for objection could not be made before the judgment-debtor got notice and on the appellants' own argument in connection with the first ground it must be taken that the order for sale was made before the order of 8th February when notice was issued for the purpose of settling the sale proclamation under Order XXI, rule 66.

1917

GOBINDA CHANDRA PAL v. KAILAS CHANDRA PAL.

In my opinion, all the grounds urged fail and the appeal should be dismissed with costs.

WALMSLEY J. I agree.

S. K. B. *Appeal dismissed.*

APPELLATE CIVIL.

Before Chitty and Beachcroft JJ.

1917

July 5.

SUDHIR CHANDRA DAS

v.

GOBINDA CHANDRA ROY.*

Executor—Powers and duties of executor—Personal liability—Right to indemnity—Interest of minor in conflict with that of executors—Necessity of minor being represented—Insufficiently stamped hundis—Plaintiff's remedy.

Before the Hindu Wills Act (XXI of 1870), the position of an executor under the Hindu Law was that of a manager. When the Hindu Wills Act incorporated section 179 of the Succession Act, the executor acquired a statutory position. An executor under the statute is the legal representative of a deceased person for all purposes and all the property of the deceased person vests in him as such. He is accordingly, in many respects, in a different position from a Hindu widow succeeding to her husband's estate, a guardian of a minor, or a *shebait* of an idol. The estate of the testator is absolutely vested in the executor for the purpose of administration and he can deal with it, as he pleases, subject to his responsibility as executor for the due administration of the estate. The executor who borrows money in the course of the administration for the purposes of the estate, is personally responsible for the repayment of such debts, though he is entitled to be indemnified out of the estate for such borrowing if he shows that it was reasonably and properly made.

* Appeals from Original Decrees, Nos. 364, 413 and 414 of 1914 and Nos. 153 to 167 of 1915, against the decrees of Behari Lal Chatterjee, Subordinate Judge of Dacca, dated May 1, 1914.

Labouchere v. *Tupper* (1), *Farhall* v. *Farhall* (2), *Romanath Paul* v. *Kanai Lal Dey* (3), *Debendra Nath Biswas* v. *Hem Chandra Roy* (4), *Satya Prashad Pal Chowdhry* v. *Matilal Pal Chowdhry* (5) referred to.

When an executor carries on the business of his testator—whether he does so for the purpose of winding it up or of making it over as a going concern to the person or persons entitled to inherit it, there does not appear to be any difference between his duties in so doing and his duties in dealing with any other part of the testator's estate. The responsibility rests entirely upon him subject only to his ultimate right to be indemnified out of the estate.

Where hundis in a suit are insufficiently stamped, it is open to the plaintiff to give the go-by to the hundis, which are inadmissible in evidence, and sue for the consideration.

Golap Chand Marwaree v. *Thakurani Mohokoom Kooaree* (6) *Pramatha Nath Sandal* v. *Dwarka Nath Dey* (7) referred to.

Ordinarily the executors represent the estate but not in a case where their personal interests as executors are diametrically opposed to those of the minor. When such is the position of affairs, the minor's interests must be safeguarded and the minor properly represented at the trial.

APPEALS by Sudhir Chandra Das, minor defendant, through his guardian *ad litem* Mr. A. C. Banerjee, and another.

These appeals arose out of suits for moneys on hundis and promissory notes on demand. The facts are shortly these. One Srish Chandra Das had a very flourishing banking business at Dacca. The business was of long standing and the public used to invest moneys in it and obtain interest at the market rate. The usual practice was to execute hundis, promissory notes on demand or khatas in favour of the depositor and in case of payment of interest on hundis the due dates of the same were extended and endorsed and sometimes hundis were renewed. The hundis were

(1) (1857) 11 Moo. P. C. 198.
(2) (1871) L. R. 7 Ch. 123.
(3) (1894) 7 C. W. N. 104.
(4) (1903) I. L. R. 31 Calc. 253.
(5) (1900) I. L. R. 27 Calc. 683.
(6) (1878) I. L. R. 3 Calc. 314
(7) (1896) I. L. R. 23 Calc. 851.

1917

SUDHIR CHANDRA DAS v. GOBINDA CHANDRA ROY.

drawn by an officer of the firm and accepted by another on authority. Srish made a will appointing his widow, Rajeswari, executrix and his cousin and officer, Rajani, executor of his estate and authorized his widow to adopt his daughter's son, the minor Sudhir Chandra Das. He died on the 27 Agrahayan 1311 (11 Dec. 1904). Sudhir was adopted on 18th Bysak 1313 (26th April 1906) and the business was carried on till Bysak 1319. After Srish's death the executrix and executor applied to the District Judge for probate of will. It was contested by Indumati, another daughter of Srish, but ultimately the probate case was compromised on payment of Rs. 30,000 to the objector, and probate was granted to the executrix and executor who appointed Chandra Kumar Dutt manager of the estate. After Chandra Kumar resigned, Tara Nath Bose was appointed manager. After Srish's death the administrator *pendente lite* carried on the banking business with the sanction of the District Judge and accepted the hundis which were for the investments made. After the grant of the probate business was carried on by the executrix and executor. One of the *gumastas* (*i.e.* an officer of the firm) used to draw the hundis upon the firm, and Rajani as executor used to accept them. In some cases Rajeswari accepted the hundis. In this manner business was done till it was closed. In these suits the hundis were accepted and promissory notes on demand executed by Rajani as executor.

Some of the hundis in suits were renewed hundis—the original investments having been made during the life-time of Srish. All these suits had been instituted within time from the due dates. In these suits the plaintiffs' prayer was to make the estate of Srish liable. They had made the executor Rajani, the executrix Rajeswari, the minor son Sudhir, and the Receiver,

parties to the suit and had sought to make the executor and executrix personally liable in case the estate or the assets of the firm be not liable.

The Subordinate Judge decreed the suits against the estate of Srish, absolving the executors from personal liability. Hence this appeal.

Mr. B. Chakravarti, Babu Basanta Kumar Bose and *Babu Bipin Behari Biswas*, for the appellants.

Mr. B. C. Mitter, Mr. C. R. Das, Mr. S. C. Roy, and *Dr. Sarat Chandra Bysak*, for the respondents.

Cur adv. vult.

CHITTY J. These are eighteen appeals filed by Sudhir Chandra Das, the infant adopted son of Srish Chandra Das, through his guardian *ad litem* Mr. A. C. Banerjee, and by Mr. K. B. Dutt, Receiver of the estate of Srish Chandra Das, against as many decrees of the First Subordinate Judge of Dacca. The eighteen suits were heard by the Subordinate Judge and disposed of by him in one judgment. The main questions are common to all these suits but there are points peculiar to some of them which must be separately dealt with. The Subordinate Judge has held the estate of Srish Chandra Das responsible for the debts claimed in these eighteen suits absolving the executor from personal liability. It will be convenient to deal first with the questions which are common to all the suits and then to deal with any points peculiar to any one or more of them.

The facts are not seriously disputed. Srish Chandra Das was a zemindar and banker carrying on business at Dacca and elsewhere. He had inherited the business from his grandfather Raj Chandra and his father Pratap Chandra. The business was carried on in the name of Issur Raj Chandra Pratap Chandra

1917

SUDHIR CHANDRA DAS v. GOBINDA CHANDRA ROY.

CHITTY J.

Das. It is with this banking business that we are concerned in these appeals. The method of business appears to have been to take deposits from the public and pay them interest at the bank rate, while presumably out of those deposits, loans were made to other persons at a higher rate of interest. The business undoubtedly had a good name in the district and many people were found willing to entrust their moneys to Srish Chandra Das. The method of taking deposits was on receiving money from a person to pass to him a hundi payable at 90 days' sight or a promissory note or even a plain *hâtchitta*. These documents appear to have been given rather as evidence of the deposits than as negotiable instruments; that is to say the depositor was often willing to leave his money with Srish Chandra Das, long after the due date of the hundi or promissory note had expired. But we understand that the hundis and promissory notes were, as a matter of form, renewed from time to time. Srish Chandra Das died on 12th December, 1904, having the day previous made his will, of which he appointed his wife, Rajeswari Chaudhurani, defendant No. 1, executrix and his cousin and servant, Rajani Mohan Das, defendant No. 2, executor. The will is very short and simple, and no question turns upon its construction. He empowered his wife to adopt Nirmal Chandra Das, the son of his daughter Sarojini or failing him, any other person. To the son so to be adopted the testator left the whole of his estate, subject to an allowance of Rs. 100 a month to be paid to his two eldest daughters and two houses to be given to them. The testator left him surviving, besides his wife Rajeswari, four daughters: Sarojini, who married Bankim Chandra Chaudhury and whose son Nirmal Chandra was to be adopted; Indumati, who married Bepin Behari Biswas; Promila, who married Gnanoda

Roy Chowdhury (known as Raja of Dubalhati); and Sukumari. On the 22nd February, 1905, an application was made to the District Judge of Dacca for probate of the will by the executors. The testator's daughter Indumati filed a caveat, and on 4th April, 1905, Babu Chandra Kumar Dutt was appointed administrator *pedente lite*. The probate case was soon afterwards settled. Indumati was paid Rs. 30,000 out of the estate and withdrew her caveat. Probate was accordingly issued to the executrix and executor on 22nd May 1905. On 26th April, 1906, Rajeswari adopted the boy Nirmal Chandra Das, who was then given the name of Sudhir Chandra and who is one of the appellants before us. The executors continued to carry on the business of the testator and for that purpose appear to have borrowed very large sums of money. Their management was not successful and the estate became more and more heavily involved.

On 26th April, 1912, a suit was filed on the Original Side of this Court (suit No. 415 of 1912) by Sudhir Chandra Das, through his adoptive sister and next friend Promila, against the executrix and executor. In that case after contest a preliminary decree was passed by Chaudhuri J. on 6th May, 1913. Notices were issued in that suit to all the 107 creditors of the estate and we are told that among the creditors all the plaintiffs now before us preferred their claims. The business had gone from bad to worse and in 1912, it was finally closed. In that year and in 1913, 75 suits were filed against the executors of the estate by various creditors—6 in the High Court and 69 in the mofussil. Of these the High Court suits and 51 mofussil suits were stayed. The 18 suits now before us were not stayed and have gone to decree. We think that the Subordinate Judge did not exercise a wise discretion in declining to postpone the hearing

1917

SUDHIR CHANDRA DAS v. GOBINDA CHANDRA ROY.

CHITTY J.

of these 18 suits also, and allow these plaintiffs to prove in the administration suit along with the rest of the creditors of the estate. The matter was brought to his notice but he appears to have declined to act without a specific order of this Court upon himself. If his decrees against the estate were in other respects proper and could be supported even then it would give the present plaintiffs a somewhat unfair advantage over the other creditors of the estate because they would come in with their claims already decided and increased by the costs of hearing in their several suits. It should be stated that in the administration suit Gnanoda Nath Roy Chowdhury was appointed Receiver. His place is now held by Mr. K. B. Dutt. In the administration suit, Promila was removed from the position of next friend and Mr. S. P. Bose was appointed on 27th July, 1912. Later his place was taken by Mr. A. C. Banerjee. On the 12th August, 1912, Gnanoda Nath Roy Chowdhury as Receiver took possession of the estate, and it was at or about that time that the business was closed.

For the most part, the debts now in question in these 18 suits were incurred by the executors between the years 1909 and 1912. In two cases (suits 21 and 213) it is alleged that the hundis were in renewal of former hundis and that those debts were actually incurred in the life-time of Srish Chandra Das. In another suit (No. 51) it is said that the hundis were in renewal of debts incurred by Rajeswari when she was heiress of the estate before the adoption of Sudhir Chandra Das. The main question in these appeals is whether the decrees should have been passed, as they have been passed, against the minor and the Receiver, that is to say, against the estate of Srish Chandra Das, and not against the executrix and the executor personally. It is admitted that the claims in all these 18 suits are

based on hundis written by an employée of the firm and accepted by Rajani Mohan Das as executor. Rajani Mohan Das died pending the appeals and his sons have been brought on the record as his legal representatives.

It was argued by the learned counsel for the plaintiff in Appeal No. 364 which is the main appeal before us, that the executors had power to carry on the business, to borrow money for that purpose, and to bind the estate by those borrowings. A long and elaborate argument was addressed to us as to the position of an executor under the Hindu Law. It was said—and rightly said—that before the passing of the Hindu Wills Act (XXI of 1870) he was a manager. It was not until the Hindu Wills Act incorporated section 179 of the Succession Act that the executor acquired a statutory position, and that the estate of his testator vested in him. It was conceded that the powers of an executor under the statute were, if anything, larger than those which he possessed before and it was said that no powers which he possessed before had been taken away. It was argued that, as a widow or a guardian of a minor or a *shebait* was a manager, therefore an executor, who was also a manager, stood in the same position. The argument is obviously fallacious. The analogy is in no sense complete, and the cases which deal with the peculiar powers of widows, guardians or *shebaits* have really no bearing upon the present question. A very large number of cases dealing with such persons and their powers were cited before us, and I have been at some pains to examine those decisions. I am, however, entirely unable to see that they afford any assistance for the decision of these appeals. We have to deal with executors, and their powers and duties as such. An executor under statute is the legal representative of a

1917

SUDHIR CHANDRA DAS v. GOBINDA CHANDRA ROY.

CHITTY J.

deceased person for all purposes and all the property of the deceased person vests in him as such. Section 4 of the Probate and Administration Act (V of 1881) is a reproduction *verbatim* of section 179 of the Succession Act (X of 1865), which was made applicable to Hindus by section 2 of the Hindu Wills Act. The executor is therefore in many respects in a different position from a Hindu widow succeeding to her husband's estate, a guardian of a minor, or a *shebait* of an idol. The estate of the testator is absolutely vested in the executor for the purpose of administration and he can deal with it as he pleases, subject, of course, to his responsibility as executor for the due administration of the estate. His powers are defined in Chapter VI of the Probate and Administration Act while his duties are dealt with in Chapter VII. One of the duties of an executor is to collect with reasonable diligence the property of the deceased and the debts that were due to him at the time of his death (section 100). By section 105 debts of every description must be paid before any legacy. It has been held in several cases in this Court that the executor who borrows money in the course of the administration for the purposes of the estate is personally responsible for the repayment of such debts, though he is entitled to be indemnified out of the estate for such borrowing, if he shows that it was reasonably and properly made. This principle was laid down in England in the cases of *Labouchere* v. *Tupper* (1) and *Farhall* v. *Farhall* (2). It has been applied to the case of Hindus in at least three cases decided by the Court: *Romanath Paul* v. *Kanai Lal Dey* (3), *Debendra Nath Biswas* v. *Hem Chandra Roy* (4), and *Satya Prashad Pal Chowdhry* v. *Matilal*

(1) (1857) 11 Moo. P. C. 198.
(2) (1871) L. R. 7 Ch. 123.
(3) (1894) 7 C. W. N. 104.
(4) (1903) I. L. R. 31 Calc. 253.

Pal Chowdhry (1). It is true that in the last-mentioned case the Court held the estate liable on *hatchittas* executed by the executrix but that decision was based on the peculiar facts of that case. *Farhall* v. *Farhall* (2) was referred to and the remarks of Mellish L. J. were applied. The English law as stated in various passages in Williams on Executors was also accepted. I do not think that the principle of an executor's personal liability, as laid down in England and accepted by this Court as applicable to Hindu executors, can now be disputed. But it was said that those cases are distinguishable from the present inasmuch as the debts there dealt with were ordinary debts on contract and not obligations undertaken in the conduct, and for the purposes of business. It was argued that a business in India is on a different footing from a business in England—that it is here an heritable asset, which passes on the owner's death to his heirs. There is no doubt some distinction between the two but it is not a very real one. In England executors do, and must, carry on their testator's business for the purpose at any rate, of winding it up. As to how long they can do so is a matter to be considered in every case. Sometimes the conduct of a business by executors in England has been prolonged over a large number of years as for instance, where a testator has directed in general terms that the sale and conversion to his property might be postponed for such period as to the executor should seem expedient: see *In re Crowther*, *Midgley* v. *Crowther* (3). In India a business such as this, is undoubtedly a heritable asset: see *Sakrabhai Nathubhai* v. *Maganlal Mulchand* (4). It will pass to the owner's heirs, and, in the case of a will, will vest in his executor. In respect of the duties of the

(1) (1900) I. L. R. 27 Calc. 683.
(2) (1871) L. R. 7 Ch. 123.
(3) [1895] 2 Ch. 56.
(4) (1901) I. L. R. 26 Bom. 206, 215.

1917

SUDHIR CHANDRA DAS v. GOBINDA CHANDRA ROY.

CHITTY J.

executor in carrying on that business—whether he does so for the purpose of winding it up, or of making it over as a going concern to the person or persons entitled to inherit it, there does not appear to be any difference between his duties in so doing, and his duties in dealing with any other part of the testator's estate. An executor may pledge any portion of his testator's estate in order to raise money for the purpose of administration *e. g.* mortgaging a zemindari for the payment of Government revenue. I am unable to see any distinction between his borrowing money for other purposes of the estate and his borrowing money in order to carry on a business. In either case he can only do so for the benefit of the estate; and in so borrowing the responsibility rests entirely upon him subject only to his ultimate right to be indemnified out of the estate.

It appears to me, therefore, that in these cases the decrees ought undoubtedly to have been passed against the executrix and the executor personally subject to their right of indemnity against the estate if in the administration suit they showed that the borrowing was in all respects proper and for the benefit of the estate; I must of course assume that they might be able to show that the borrowing was for the benefit of the estate. Here the facts, so far as they have been investigated, point rather in the other direction.

The learned Subordinate Judge has, I think, fallen into a serious error in shutting out evidence of anything like mismanagement on the part of the executrix and executor. He has also held that the question of indemnity cannot be gone into in this case. The latter would be a correct decision, if he were making the executors liable; but it is clearly wrong if he is making the estate liable because in that case he has shut out any question of the propriety or

impropriety of the executor's conduct in borrowing these moneys. Even on the present imperfect elucidation of the facts, it would appear that the executors acted recklessly in carrying on this business. The debts of the business at the time of the testator's death, we are told, amounted to about six lakhs of rupees. The executors continued to add to that liability and only succeeded in paying off a portion of it. The result was that the business after 6 or 7 years of such management was found to be insolvent and had to be closed. Rajani Mohan Das himself stated, that, had it been closed at Srish's death, the whole estate would have been ruined. This was probably an exaggeration, but it shows that the liabilities of the business, as distinct from the rest of the estate, were far in excess of its assets, for I do not think that the whole estate including the zemindaris can properly be regarded as assets of the business. No doubt looking at the testator's estate as an entire whole, they might in a sense be so regarded. Rajani Mohan Das also admitted that the executors incurred a liability of some Rs. 50,000 in order to invest in immovable property worth Rs. 70,000 the balance presumably being met from other portions of the estate. If the business was in that condition at the date of Srish's death it is difficult to see how the executors were justified in borrowing for such a purpose. Nor could they be justified in incurring further debts in the vain hope of saving the business as a going concern.

As to the liability of Rajani Mohan Das, or rather (as he is dead) of his estate there can be no question. It was argued on behalf of Rajeswari, defendant No. 1, that she had nothing to do with the business and that she was not accountable for the acts or defaults of her co-executor. The evidence, however, shows that this contention is not correct. It was she who decided to

1917

SUDHIR CHANDRA DAS v. GOBINDA CHANDRA ROY.

CHITTY J.

carry on the business after her husband's death and did in fact carry it on. She appointed the manager Babu Chandra Kumar Dutt and the evidence shows that to some extent she looked into the details of the business. She was at that time in the position of heiress to her husband's estate because until the adoption took place, there was a partial intestacy. She was therefore in the dual capacity of executrix and heiress. She cannot, however, escape her responsibility as executrix by pleading that she gave orders in the other capacity. The arguments addressed to us for the plaintiffs respondents appear to me to be somewhat inconsistent, because it was conceded that the executors could not charge the estate except for moneys properly borrowed and that the creditors were bound to make enquiries to see whether they were justified in lending to the estate, and yet the plaintiffs seek to make the estate liable without any investigation of those matters. That the plaintiffs made no such enquiries is clear. There is no evidence of anything of the kind and it does not appear to have been contended before the Subordinate Judge that they made any such enquiries at all.

It was argued for the plaintiffs that, as the estate had vested in the widow as heiress on the testator's death and in the adopted son from the date of adoption he being under the guardianship of his mother Rajeswari, the estate would be bound as she could assent to the borrowing of these moneys, first in her capacity as beneficiary, and then in her capacity as guardian of the minor beneficiary. This is also fallacious because the estate was wholly vested in the executors as such and they were responsible till such time as the administration was complete. Admittedly, it is not yet complete and the propriety of their borrowing may yet be investigated in the administration

suit. It should perhaps be stated that there is no provision in the will authorising the executors to carry on the business. So far as they did so, they did it subject to the general law in such matters. In suits Nos. 21 and 213 (Appeals Nos. 758 and 163) it was stated that the hundis were in renewal of former hundis and that the original deposits had been made in the life time of Srish Chandra Das. It was urged that in these suits at any rate the decrees should be against the estate. No doubt, if the facts are as stated, these cases stand on a somewhat different footing to the rest. It may well be that in those cases the executors would have but little difficulty in establishing their right to indemnity and these creditors would get the benefit of that in the administration suit. There are, however, substantial objections to passing decrees at once against the estate in these cases. In the first place, the evidence that the deposits were made in Srish Chandra's life time is by no means complete. It is at present rather a matter of inference than of proof. Secondly, all evidence of mismanagement has been shut out, so that it is impossible to decide one way or another as to the propriety of the executor's conduct in renewing these loans. Thirdly, the question of indemnity has not been, and cannot be, gone into here and that must be determined before the estate can be charged. I think, therefore, that these claims should stand over with the others for investigation in the administration suit. On the whole, I am of opinion that these 18 decrees against the estate cannot stand but that they must be entered up against the executors in their personal capacity, subject to their right of indemnity, if any, in the administration proceedings.

This disposes of the main question which is common to all the appeals.

1917

SUDHIR CHANDRA DAS v. GOBINDA CHANDRA ROY.

CHITTY J.

With regard to Appeals Nos. 157, 159, 161, 165, 413 and 414, it appears that the hundis in these suits were insufficiently stamped. In Appeals Nos. 161 and 414, the question cannot be gone into as the Subordinate Judge points out that the objection was not taken until after the admission of those hundis in evidence. As to the other four appeals I think that the Subordinate Judge is right in holding that the plaintiffs were at liberty to give the go-by to the hundis which were inadmissible in evidence and sue for the consideration. That appears to be settled law, so far as this Court is concerned: see *Golap Chand Marwaree* v. *Thakurani Mohokoom Kooaree* (1) and *Pramatha Nath Sandal* v. *Dwarka Nath Dey* (2). In the administration suit these creditors could certainly come in and claim the executors' indemnity, if they had any, against the estate.

In appeal No. 156, the plaintiff challenged the validity of the adoption of Sudhir Chandra Das. The learned Subordinate Judge held that the point was beyond the scope of that suit and declined to go into it. In this he was, I think, in error. If Sudhir Chandra Das was on the record as the beneficiary representing the estate, it is clear that the estate could only be represented by him if he was in fact such beneficiary. That would depend on the validity of his adoption. If the point was raised, as in this case, it undoubtedly was; the lower Court ought, I think, to have gone into it. In the view that I take of the liability of the executrix and the executor, the matter becomes of little importance as the suits must fail against Sudhir Chandra Das. In all the other cases the validity of adoption, though at one time in question, was not seriously disputed either in the lower Court or before us on appeal.

(1) (1878) I. L. R. 3 Calc. 314. (2) (1896) I. L. R. 23 Calc. 851.

This is sufficient to dispose of the 18 appeals.

There is, however, another and equally substantial ground on which the decrees of the Subordinate Judge against Sudhir Chandra Das must necessarily be set aside. It is clear from the record in these various suits that the minor Sudhir Chandra Das was not properly represented in the Court below. In suit 91 of 1913 (Appeal No. 162), the minor Sudhir Chandra Das was never made a party at all. The Receiver, Kumar Gnanoda Nath Roy, was a party defendant No. 5, and his place was taken by Mr. K. B. Dutt on 22nd January, 1914. The learned Subordinate Judge says that the absence of the minor was immaterial, as the estate was fully represented by the executors. Ordinarily speaking, no doubt, the executors could fully represent the estate but not in a case like this where their personal interests as executors were diametrically opposed to those of the minor beneficiary and the estate. The minor is spoken of throughout in all the suits [except suit No. 91 (Appeal No. 162) just mentioned] as represented by his guardian *ad litem*, Janaki Nath Roy. We have been at some pains to investigate the facts which led up to the appointment of Janaki Nath Roy in each and every one of these cases. It is not necessary to go through them in detail at this stage. It is sufficient to say that in most cases the plaintiffs proposed, as was not unnatural, the appointment of Rajeswari as guardian *ad litem* of her minor son. In most cases the notices required by Order XXXII, rule 3 of the Code of Civil Procedure, were issued on the minor and Rajeswari. In some cases no notice at all was issued. In many cases the service of the notice is left in doubt. In several cases there was no formal appointment of a guardian at all. In all the cases, however, it appears that Janaki Nath Roy who is a cousin of Rajeswari came forward of his own

1917

SUDHIR CHANDRA DAS v. GOBINDA CHANDRA ROY.

CHITTY J.

motion and asked to be appointed guardian *ad litem*. It is certain that he did so as the nominee of Rajeswari. Now it cannot be disputed for a moment that the interests of Rajeswari were wholly antagonistic to the interest of her minor son. It was, therefore, impossible that she could act as his guardian *ad litem*, nor was it right that her nominee should be appointed to that post. Another extraordinary circumstance is that one at least of the pleaders for the parties, namely Babu Birendra Chandra Sircar, was appearing both for the minor and his mother. In other cases we find that the pleaders in the Court below were occasionally to be found first on one side and then on the other. Thus Babu Peary Lal Das, who appears throughout as the pleader of the minor or of the Receiver, appears in one case to have made an application for the mother. He appears in one case at least to have held a *vakalatnama* for Rajani Mohan Das (see the decree in suit 91 of 1913). On 29th May, 1914, directly the hearing was over, Janaki Nath Roy put in a petition in all the suits (except No. 91 of 1913) praying to be relieved of his guardianship. This was granted on the 20th June, 1914, when Mr A. C. Banerjee was appointed in his place. I should not be disposed to lay such stress on the absence in some cases of a formal order of appointment, in view of the fact that the cases were all tried together, and Janaki Nath Roy was formally appointed in most of them. The substance, however, of the objection is that the minor was not properly represented or his case, which was diametrically opposed to that of the executors, properly put before the Court by Janaki Nath Roy. This is shown by the fact that no evidence was called on his behalf, the only witness nominally called by him being a pleader who was called to prove the affidavit in the petition for probate,

in other words to give evidence in favour of the executors. The cases were, except for some desultory cross-examination, conducted practically without opposition on behalf of the minor. As I have before observed the learned Subordinate Judge (in my opinion erroneously) shut out the evidence of mismanagement on the part of the executors which the pleader for the minor wished to elicit by cross-examination. It may be said that in most of the cases the Receiver was also a party and that he could, and did, properly represent the estate. He was made a party simply in his capacity as Receiver. He does not appear to have taken any active part in the proceeding. It may be that he had no funds in his hands to enable him to conduct the defence in a more strenuous manner. The fact remains that the real defendant brought on the record to represent the estate was the minor Sudhir Chandra Das, and his interests, which were at stake, have not been properly safeguarded in the trial in the Court below. The learned Subordinate Judge appears to have taken a somewhat one-sided view of the case throughout, and instead of endeavouring to protect the minor and his interests, has been too ready to protect the executors at the expense of the minor and his estate. There appears to be no foundation in fact for the suggestion that in the Court below the executors and the guardian *ad litem* of the minor were combining to defeat the claims of the creditors. The impression left on my mind, after a full consideration of the whole case, is rather that the executors were playing into the hands of the creditors in order to relieve themselves of liability by throwing it on the estate.

I would accordingly set aside all these 18 decrees of the Subordinate Judge and enter up decrees for the several amounts against the executrix and the

1917

SUDHIR CHANDRA DAS v. GOBINDA CHANDRA ROY.

CHITTY J.

executor personally (the executor now being represented by his sons) with liberty to the plaintiffs to claim the executor's indemnity, if any, against the estate in the administration proceedings.

The appeals must be allowed with costs, that is to say, the suits will be dismissed against the present appellants with costs, one set only in both the Courts. The plaintiffs will have their decrees against the executrix and the executor personally with costs in both the Courts. The executrix and the estate of the executor will also be responsible jointly with the several plaintiffs to the appellants for their costs of these appeals.

BEACHCROFT J. I agree.

S. K. B. *Appeals allowed.*

APPELLATE CRIMINAL.

Before Teunon and Shamsul Huda JJ.

AMIRUDDIN AHMED

v.

EMPEROR.*

1917

July 30.

Misdirection—Confession—Instructions to Jury to consider non-confessional statements against co-accused—Direction to consider question of admissibility of confessions—Duties of Judge and Jury as to mode of dealing with confessions—Use in the charge to the Jury of expressions assuming guilt of the accused, and of slang terms—Discovery—Admissibility of part of information leading to discovery—Verification of confessions—Oral evidence of unrecorded confessions made in verification proceedings—Misdirection in placing before Jury information not leading to discovery and such unrecorded confessions—Criminal Procedure Code (Act V of 1898) ss. 164, 298—Evidence Act (I of 1872) ss. 24, 27, 30.

It is a misdirection, which must have misled the Jury, to instruct them to take into consideration statements not amounting to confessions by an accused as against the co-accused.

It is a misdirection to put to the Jury and to leave it to themto determine whether a confession to a Magistrate, and how much of a confession to the police, are admissible. It is the duty of the Judge to determine the question of the admissibility of evidence, in accordance with the law on the subject, and of the Jury to estimate the value of such evidence after its admission by the Judge.

The Judge should avoid the use, in the charge to the Jury, of interrogative expressions assuming the guilt of the accused, such as "*Is not this*", or "*Does not that*", and of slang and colloquial phrases.

Section 27 of the Evidence Act qualifies not only sections 25 and 26 but also section 24.

Queen-Empress v. *Babu Lal* (1) approved.

Though the accused has himself produced the stolen articles, so much of his anterior statements as led to the discovery are admissible under s. 27

* Criminal Appeal, No. 377 of 1917, against the order of D. P. Bagchi, Additional Sessions Judge of Mymensingh, dated May 9, 1917.

(1) (1884) I. L. R. 6 All. 509.

1917

AMIRUDDIN AHMED v. EMPEROR.

of the Evidence Act, but not statements contemporaneous with the act of production, such as " *I got these ornaments as my share in the dacoity* ".

Queen-Empress v. *Nana* (1) and *Legal Remembrancer* v. *Chema Nashya* (2) referred to.

Section 27 does not render admissible the whole history of the investigation, or an account of the various steps by which the police obtained and worked up clues and finally succeeded in arresting the accused.

Under the section the whole of the statement of an accused is not admissible, but only so much as led directly to the discovery or related directly to the fact discovered.

PER SHAMSUL HUDA J. If a single statement contains more information than is contemplated by s. 27, the whole statement is not admissible but only the particular information which led to the discovery. Where an accused states to the police that he killed A with a knife and concealed the corpse at a particular place, the only part of the information admissible under the section is that relating to the concealment and not the murder.

Queen-Empress v. *Babu Lal* (3) followed.

Per TEUNON J. Verification proceedings are not wholly illegal, and may be useful in testing the truth of the confession, *e.g.*, as to the accused's knowledge of the localities he has mentioned, or as furnishing clues to a further inquiry.

Per SHAMSUL HUDA J. Verifications in the company of the accused lead to very great abuses and should be avoided, though a verification independently of, and unaided by, the accused, is unobjectionable.

Held per CURIAM. In connection with such proceedings, the Courts must ensure against the reception of evidence not strictly admissible. Statements to the verifying Magistrate, when not recorded in the manner provided by s. 164 of the Criminal Procedure Code, are inadmissible and cannot be proved orally by such Magistrate.

Emperor v. *Radhe Halwai* (4), *King-Emperor* v. *Rajani Kanto Koer* (5), *Queen-Empress* v. *Bhairab Chunder Chuckerbutty* (6) and *Queen Empress* v. *Viran* (7) followed.

Per SHAMSUL HUDA J. Even if the statements are recorded after the verification is completed, it would be difficult to hold that they were voluntary.

ON the night of the 24th November, 1916, a band of dacoits entered the houses of Rajendra and Debendra

(1) (1889) I. L. R. 14 Bom. 260.
(2) (1897) I.L. R. 25 Calc. 413.
(3) (1884) I. L. R. 6 All. 509.
(4) (1902) 7 C. W. N. 220.
(5) (1903) 8 C. W. N. 22.
(6) (1898) 2 C. W. N. 702.
(7) (1886) I. L. R. 9 Mad. 224.

Bhoumik, in the village of Rajoi, broke open chests and trunks and stripped the inmates of their ornaments, and escaped with property of the value, in cash, notes and jewellery, of Rs. 9,000 and Rs. 300, from the two houses, respectively. The chowkidar reported the occurrence at the thana, and the police arrived at the spot and began their investigation next morning.

In the meantime a constable of the Giffargaon thana received some information about the dacoity from the appellant Amiruddin, on the night of the 26th, and reported the same to his superior officers. On the 27th, Amiruddin was called and reiterated the information he had given. On the next day the Junior Sub-Inspector arrested Zahir and Piru near the railway station. An Inspector of Police, who had now arrived, took the statements of the two accused. In consequence of the statement of Zahir the police arrested Moniruddi on the 29th, and searched his house, where only a Dietz lantern was found. Moniruddi made a statement to the Inspector implicating the appellant Amiruddin. On the arrival of the District Superintendent of Police, at the thana, Zahir, who had not named the appellant, on being confronted with Moniruddi, now admitted that the appellant had also been a member of the gang of dacoits. The police then took the appellant to the Dâk Bungalow where he made a detailed confession to the District Superintendent who was putting up there, relating what he and the other three men had received as his and their shares of the property stolen not only in the Rajoi dacoity but also in the one at Baliapara a month previous. He said he had concealed the articles which he had received in an earthen pot in a tank, and offered to point out the place. Being confronted with him Zahir, Piru and Moniruddi also admitted what they

1917

AMIRUDDIN AHMED v. EMPEROR.

had got in the Rajoi dacoity, and promised to produce the things. The police then set out with the four men to their houses. On the way Moniruddi pointed out the smithy where the *shabal*, used in the course of the Rajoi dacoity to break open the iron chests, was kept, and the instrument was seized. The District Superintendent thence proceeded with the appellant to the latter's house. The appellant pointed out the tank, entered it and searched for the pot but could not find it. The tank was dragged with nets and the pot was brought up. The appellant then took from it some ornaments and said "*I got these ornaments as my share in the Rajoi dacoity*". The Inspector of Police had, in the meanwhile, taken Moniruddi to his house, and the latter brought out a gold necklace. The police next went to Zahir's house and he asked his mother to bring what he had given her, whereupon she made over a small bundle to him. Zahir untied it and took out an ornament.

The party finally went to Piru's house. Piru asked his wife where she had kept the property, upon which she pointed to a haystack where she had concealed the same. Two boxes and a tin trunk were taken out. All the articles found were shown to Rajendra and Debendra. The former failed to identify any of them, but the latter, his wife and daughter identified some of the things as theirs.

On the 30th November, the accused were produced before a Deputy Magistrate. The appellant made a detailed confession implicating himself and the three other accused. Zahir and Piru made statements not amounting to confessions of their own guilt. Moniruddi made no statement. On the 3rd December, the Deputy Magistrate took the appellant with him in order to verify his confession. He made certain additional statements which were not recorded by

the Magistrate but were proved by him orally at the Sessions trial. The verification proceedings lasted from the 3rd to the 5th December.

After a preliminary inquiry, the four accused were committed to the Court of Sessions at Mymensingh. They were tried by the Second Additional Sessions Judge with a Jury and convicted, under s. 395 of the Penal Code, and sentenced to five years' rigorous imprisonment. Amiruddin appealed to the High Court against his conviction and sentence.

Babu Dasarathi Sanyal and *Babu Jatindra Mohan Chowdhry*, for the appellant.

The Deputy Legal Remembrancer (*Mr. Orr*), for the Crown.

TEUNON J. In this case the appellant before us has been convicted of dacoity and sentenced, under section 395 of the Indian Penal Code, to rigorous imprisonment for five years.

The trial was by Jury in the Court of the 2nd Additional Sessions Judge of Mymensingh, and what has been urged before us is that the trial has been vitiated by the erroneous admission of evidence and by serious misdirections in the learned Judge's charge.

It appears that on the night of the 24th of November, 1916, at a village called Rajoi, a serious dacoity took place in the houses of two cousins, Rajendra and Debendra Bhoumik. From the house of Debendra, cash, currency notes, ornaments and other articles to an aggregate value of over Rs. 9,000, and from Rajendra's house cash and other property to the value of some Rs. 300, are said to have been removed.

In connection with this dacoity and with a dacoity that took place in village Baliapara about a month before, the appellant, it appears, came into touch with the police on the 26th of November. On the 28th of

1917

AMIRUDDIN AHMED v. EMPEROR.

TEUNON J.

that month, two persons of the name of Zahir and Piru, and on the 29th a third man named Moniruddi were arrested. Thereafter, also on the 29th, the appellant was himself arrested.

It is next said that all the four persons so arrested made confessions to certain police officers, and that the confessions so made led to certain discoveries.

On the following day, the 30th November, all four were produced before a Deputy Magistrate, to whom the appellant made a confession, and Zahir and Piru made statements. On the 3rd of December the Deputy Magistrate, who recorded the statements, next proceeded to verify the appellant's confession, and in the course of these verification proceedings, which continued to the 5th December, the appellant, it is said, made additional statements.

Ultimately all four accused were placed on their trial, and all four have been convicted. We are, however, not concerned with Piru, Zahir and Moniruddi whose cases are not before us.

I shall now deal with the objections that have been taken before us to the trial as conducted by the learned Judge.

The first objection or series of objections refer to the confession made by the appellant himself on the 30th November. It is urged in the first place that the Sessions Judge has not sufficiently placed before the Jury the circumstances which militate against the value of the confession, such as, (*a*) the interval between arrest and the making of the confession, in other words, the period spent in police custody, (*b*) facts indicating that the appellant had been led to believe that he would be made an approver, (*c*) the attempts made in portions of the confession to extenuate the appellant's own share in the crime, and (*d*) the discrepancy between the sums or value stolen and

the sums recovered. It has also been urged that the Judge should have excluded, or directed the Jury to discard from their consideration the first portion of the confession in which the appellant speaks of the earlier dacoity at Baliapara. In my judgment the Judge would have grievously erred had he excluded any portion of the confession, and the fact that he put the whole of the confession before the Jury detracts from the argument that he did not invite special attention to passages in which, for instance, he speaks of persuasion, or of his rescue of a child from spoliation. Similarly, the learned Judge has in fact dealt with the question of inducement. Thus, though it may be said with some reason that the Judge's treatment of the confession is to some extent one-sided, for instance, in putting to the Jury such questions as these "is not the production . . material corroboration . . do they not . . afford sufficient corroboration", and in treating the use in the confession of English expressions (which is merely consistent with evidence previously obtained), as having the value of independent corroboration, yet such misdirections as there are in this connection would not, in my opinion, have been sufficient by themselves to necessitate a retrial.

It is next urged that the Judge has erred in instructing the Jury to take into consideration as against the appellant the statements made by Zahir and Piru to the Magistrate on the 30th of November. He has throughout spoken of these statements as "confessions", "confessional statements' or "confessions of a sort", but when we examine them we find that they are not self-incriminating statements. In speaking of them as confessions and in saying that they "should" be taken into consideration as against the appellant, the Judge, it is clear, must have misled the Jury.

1917

AMIRUDDIN AHMED v. EMPEROR.

TEUNON J.

In the third place it is contended that the so-called verification proceedings are illegal, and that no evidence regarding them should have been admitted. This contention is based largely on the observations to be found in the judgments in the case of *Emperor* v. *Radhe Halwai* (1), but I do not understand that case or any other case to lay down that such proceedings are wholly illegal. They are undertaken, it would seem, with a view to testing the truth of a confession and to obtain evidence either corroborating the confession or indicating its falsity. In so far at least as such evidence may be obtained, for instance, in ascertaining that the prisoner is familiar with, or wholly ignorant of, the localities of which he has spoken, or in furnishing clues to further enquiry, such proceedings may be useful. In connection with such proceedings, the main concern of the Courts would seem to be to ensure that evidence not strictly admissible is not admitted. In the present case that precaution has not been taken: for we find that the verifying Magistrate has been permitted to speak to statements said to have been made to him in the course of his proceedings. Such additional statements being statements made in the course of an investigation, when not recorded in the manner provided in section 164 of the Code of Criminal Procedure, are, in my opinion, inadmissible. If further authority for this proposition is required, it is to be found in the cases of *Queen-Empress* v. *Bhairab Chunder Chuckerbutty* (2) (though I am not to be understood as agreeing in the distinction therein drawn between a statement and a confession), *Emperor* v. *Radhe Halwai* (1), and *King-Emperor* v. *Rajani Kanto Koer* (3).

(1) (1902) 7 C. W. N. 220. (2) (1898) 2 C. W. N. 702.
(3) (1903) 8 C. W. N. 22.

Lastly, very serious objection has been properly taken to the manner in which the Sessions Judge has dealt with the confessions said to have been made by the appellant and the co-accused to the police in the course of the police investigation. It is unnecessary, and it would be all but impossible, to enumerate in detail the errors committed by the learned Judge in this connection. He has admitted in evidence and placed before the Jury the whole history so to speak of the investigation. He has permitted the police officers and other witnesses introducing, *inter alia*, much hearsay matter, to describe the steps and processes by which they obtained and worked up clues and finally succeeded, in the Judge's language, "in tracking and trapping the culprits", and finally in "bagging" the accused on their trial.

The confessions having led, it is said, to discoveries he has next admitted in evidence not merely so much as led directly to the discovery or related directly to the fact discovered, but practically the whole of each such statement, including such matter as this. "Moniruddi named one Amiruddin (*i.e.*, the appellant), while Zahir did not . . Moniruddi and Zahir were confronted and Zahir, when thus confronted, had to admit that Amiruddin was also in the gang," and again, "Amiruddin asked to be confronted with Piru, Zahir and Moniruddi to tell them to their faces what articles they each had got in their shares".

He has next in effect directed the Jury that the statements which he has thus erroneously admitted could and should be used not merely against the maker but against his co-accused. In another respect also the Sessions Judge has dealt erroneously with this part of the case. He has expounded to the Jury the provisions of sections 24 to 30 of the Evidence Act, and has next left it to the Jury to "scrutinize

1917

AMIRUDDIN AHMED v. EMPEROR.

TEUNON J.

the confessions and the other evidence" in the light of that exposition. If in this portion of the charge he intended, as he apparently did, to leave it to the Jury to decide whether the statements or confessions made to the Magistrate, and how much of the confessions said to have been made to the police officers were admissible, he has clearly thrown upon the Jury the duty which the law lays on him. It is for the Judge to admit or exclude evidence in accordance with the law on that subject, and for the Jury to weigh and value the evidence admitted.

I have next to consider two criticisms which have been advanced in connection with this part of the case, and do not appear to me to be well-founded.

It is said that the Sessions Judge is wrong in his view that section 27 of the Evidence Act applies to and qualifies section 24 and section 25, as well as section 26. Whether, as regards section 24, the question strictly arises has not been made clear, in as much as it has not been shown to us that discoveries resulted or are said to have resulted from confessions other than confessions made to police officers, or when in the custody of police officers and not in the immediate presence of a Magistrate. If, however, the question does arise, in that case I am of opinion that section 27 qualifies not only section 26 and section 25, but also section 24. All three sections lay down general rules excluding confessions. It is in my opinion unnecessary to discuss the policy which has led to the enactment of these rules. It is sufficient to say that the same broad grounds or principles appear to underlie all three. In section 27 follows an exception. The reason for making or providing this exception applies alike to each of the three preceding general rules. If the exception had been intended to apply only to section 26 or only to sections 26 and 25

we should have expected to find this intention expressly stated or to find the exception embodied in those two sections or in section 26 alone. Further, the position of section 28 which is also in the nature of an exception to section 24, supports this view. I therefore, hold that when a confession as a whole is excluded whether by reason of the provisions of section 26 or of section 25 or of section 24, so much of the information given by the person making the confession, when accused and in custody, as distinctly relates to a relevant fact thereby discovered becomes admissible.

It has next been contended that when an accused himself produces the articles said to be discovered any anterior statement made by him is inadmissible. I am unable to assent to this contention. On the contrary I agree with the view taken in *Queen Empress* v. *Nana* (1) and in *Legal Remembrancer* v. *Chema Nasyha* (2), that in such cases so much of the information as "set the police in motion and led to the discovery" is admissible. Even so, that does not in the present case render admissible evidence to the effect that when a certain pot had been fished out, Amiruddin, when pouring out the ornaments, said: "I got these ornaments in my share in the Rajoi dacoity". That statement obviously led to no discovery.

In conclusion I have to point out to the Additional Sessions Judge that in his charge to the Jury he should avoid, as far as may be, the use of expressions which assume the guilt of the accused. I have already had occasion to deprecate his use of the interrogative method, and more particularly his addressing to the Jury questions couched in the form "Is not this" or "Does not that" and the like. Lastly, I cannot

(1) (1889) I. L. R. 14 Bom. 260. (2) (1897) I. L. R. 25 Calc. 413.

1917

AMIRUDDIN AHMED v. EMPEROR.

TEUNON J.

condemn too strongly his use of slang or colloquial phrases such as " tracking and trapping " or " bagging " culprits; more especially when applied to the persons then on their trial.

For the reasons given in our several judgments, we agree that we have no alternative but to set aside the conviction and sentence in the present case and direct that the appellant be retried. The retrial will be in the Court of the Sessions Judge.

SHAMSUL HUDA J. In this case three important questions of law have been argued before us. The first question is whether section 24 of the Evidence Act controls section 27 or is controlled by it, or in other words, whether information given to a police officer by an accused person which may have led to a discovery within the meaning of section 27 can be used as evidence in case such information is proved to have been obtained by any inducement, threat, or promise, such as under section 24 would make a confession inadmissible. The question is *res integra* so far as this Court is concerned, but there is an important decision of the Full Bench of the Allahabad High Court in *Queen Empress* v. *Babu Lal* (1) in which the question whether section 27 controls section 25 of the Evidence Act was fully discussed, and that decision has an important bearing on the decision of the present question. It was held by the majority of the Full Bench that section 27 controlled section 25, while the opposite view, viz., that it was a proviso to the next preceding section only, was maintained in an equally exhaustive judgment by Mahmood J. The reasons given for and against the view that section 27 controls section 25 also apply with equal force to the question whether that section likewise

(1) (1884) I. L. R. 6 All. 509.

controls section 24. Although at first sight it may appear somewhat anomalous that an accused person should be prejudiced by a statement made by him even against his own will, for it infringes one of the fundamental principles of law that an act done by a person against his own will is not his act, there is on the other hand the consideration that by whatever means obtained the statement receives a guarantee of its authenticity by the corroboration which the discovery leads to it. The considerations for and against the admissibility of such statement may be said to be equally balanced. If the policy of exclusion embodied in sections 25 and 26 is based on the unreliability of police officers deposing to incriminating statements made by accused persons, by reason of their being specially interested in the detection of crime and by reason of the corrupt practices that prevailed in those days, the danger is largely removed by confirmation afforded by the "discovery". If, on the other hand, the exclusion is based on a desire to remove all temptations in the way of police officers to obtain confessions by inducement, threat or torture, the discovery does not remove the danger. That both these considerations had their share in determining the provisions of sections 25 and 26 cannot be doubted. The fact, however, that sections 25, 26 and 27 existed in the Code of Criminal Procedure uncontrolled by any express provision such as we now have in section 24 of the Evidence Act, may suggest the inference that by transferring those three sections from the Code of Criminal Procedure to the Evidence Act, no change in the law was intended to be introduced. But this argument is clearly fallacious, as section 24 laid down no new principle but embodied a well-established principle regulating the admissibility of confessions: and even before it was

1917

AMIRUDDIN AHMED v. EMPEROR.

SHAMSUL HUDA J.

formally enacted as a rule of law in this country the principle governed these provisions of the Criminal Procedure Code even before their transfer to the Evidence Act of 1872. It appears, however, that the general principle derived from the English law was even under that law modified, so as to negative its application to confessions leading to "discovery": Taylor's Law of Evidence, section 824. I think, therefore, we ought to be guided by the decision of the majority of the Full Bench of the Allahabad High Court and hold that section 24 does not control section 27.

The next question for consideration is the extent to which information falling under section 27 can be given in evidence. The section itself is clear on that point and no discussion seems necessary. It lays down that only so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved. It is noticeable that the word used is not "*statement*" but "*information*", and this seems to suggest that even if a single statement contains more information than what is contemplated in section 24, the statement is not to go in as a whole, nor is it to go in as a statement at all, but what is admissible is the particular information given by the statement which has led to the discovery. If, therefore, an accused person were to state to a police officer that he killed A with a knife and concealed the dead body at a particular place, all that is admissible, is the information that he had concealed the dead body in that place but the further information that he himself had killed A is not admissible under section 27.

It was pointed out by Straight J. in the case of *Queen-Empress* v. *Babu Lal* (1) "that where a

(1) (1884) I. L. R. 6 All. 509.

statement is being detailed by a constable as having been made by an accused, in consequence of which he discovered a certain fact or certain facts, the strictest precision should be enjoined on the witness, so that there may be no room for mistake or misunderstanding". This question was fully discussed by a Full Bench of the Bombay High Court in *Queen-Empress* v. *Nana* (1). In the present case it is clear that the investigating police officer was allowed to disclose in his evidence a great deal more than is contemplated by section 27.

The last question for consideration is the propriety of the procedure adopted by the Deputy Magistrate, Maulvi Abu Ali Chowdhury, for the purpose of verifying the confession of the accused Amiruddin. It appears that after recording the confession of the accused in the regular manner this officer took the accused with him to various places referred to in the confession for purposes of verification, and in the course of such verification Amiruddin seems to have supplemented his former recorded confession by other statements of an incriminating nature, and the learned Deputy Magistrate was allowed at the trial to depose to these other statements of Amiruddin though they were never recorded at any time under section 164 of the Criminal Procedure Code. I am clearly of opinion that these additional statements could not be used as evidence against the accused. As authorities for this view I may refer to the decisions of this Court in *Queen-Empress* v. *Bhairab Chunder Chuckerbutty* (2) and *King-Emperor* v. *Rajani Kanto Koer* (3); and of the Madras High Court in *Queen-Empress* v. *Viran* (4). Apart from the question of legality of the procedure, I think I would not be

(1) (1889) I. L. R. 14 Bom. 260.
(2) (1898) 2 C. W. N. 702.
(3) (1903) 8 C. W. N. 22.
(4) (1886) I. L. R. 9 Mad. 224.

1917

AMIRUDDIN AHMED v. EMPEROR.

SHAMSUL HUDA J.

going out of my way if I expressed my concurrence with the views expressed by Prinsep and Geidt JJ. in the case of *Emperor* v. *Radhe Halwai* (1) on the utility and the propriety of such a procedure.

It seems to me that such a procedure for purposes of verification, confined as such verification must be, to facts already stated in a confession recorded in accordance with law would seldom require the presence of the accused. At any rate it was not required in the present case. The presence of the accused naturally leads to questioning and to an effort to get out of him incriminating statements which under pressure of circumstances he finds himself compelled to make and as to which it cannot be said that it is voluntary. Even, therefore, if the Deputy Magistrate had in this case tried to make the statements admissible in evidence by recording them under section 164 of the Criminal Procedure Code, after the verification had been completed, I would have found it difficult to hold that the confession was voluntary. I think, "verification" under conditions such as these lends itself to very great abuses and should be avoided. There is perhaps nothing objectionable in a verification made independently of the confessing accused and unaided by him. An accused person should not be placed in a position which *necessitates* his making incriminating statements and which leads to the creation of evidence against himself. It is the privilege of an accused to say as little as he likes regarding the offence with which he is charged or to say nothing at all, if he is so minded, but it seems to me that the procedure adopted by the verifying officer is an infringement of the privilege. In this respect the police are in a position materially different from that of a Magistrate, for, whereas, a statement made to a police officer

(1) (1902) 7 C. W. N. 220.

unless it falls within the provision of section 27 of the Evidence Act, can never be used against an accused, a Magistrate may, if he chooses, record these statements in the manner required by law after the verification procedure is over, and thereby give such record an air of validity which in reality does not attach to it.

I think, therefore, that there was misdirection to the Jury in so far as the learned Judge admitted as evidence confessional statements made to the police which were not strictly within the limits laid down by section 27 of the Evidence Act and also in so far as he allowed the Deputy Magistrate, Mr. Abu Ali Chowdhury, to depose to statements made by the accused in the course of the procedure adopted by him for verifying the confession of the accused, statements which were at no time recorded by him in accordance with the provisions of section 164 of the Criminal Procedure Code, and it is highly likely that the admission of such evidence not legally admissible has prejudiced the accused in the trial. For these and for other reasons given in the judgment of my learned brother, I agree with him in directing a retrial.

E. H. M. *Retrial directed.*

LETTERS PATENT APPEAL.

Before Mookerjee and Walmsley JJ.

1917

Aug. 28.

BIPRADAS PAL CHOWDHURY

v.

MANORAMA DEBI.*

Lakheraj Lands—Presumption arising from possession—Omission of entry in Pergana Register, Kanungo Register, General and Mauzawar Register, Thakbust Map, evidentiary value of—Bengal Tenancy Act (VIII of 1885), ss. 103B, 106—Regulation XIX of 1793, ss. 22 to 25.

A purchased a putni taluk in 1899, and the Record of Rights was finally published in 1909, containing an entry to the effect that no rent was actually paid but that the occupant B was not entitled to hold without payment of rent. B instituted a suit under s. 106 of the Bengal Tenancy Act, for a declaration that the lands were his rent-free *brahmottar*, and that the entries in so far as they stated that the lands were liable to be assessed to rent were incorrect, and claimed continued possession without payment of rent or revenue since the date of the grant of the lands to his predecessors. A relied upon the omission of any entries as to the lands being *lakheraj* in the Pergana, Kanungo, General and Mauzawar Registers and Thakbust Maps and Proceedings :—

Held, that the proved possession free from payment of rent was sufficient to rebut the presumption that the lands were liable to be assessed to rent.

Held, further, that the omission from the Pergana, Kanungo, General and Mauzawar Registers, and Thakbust Maps and Statements, of any indication that the lands were *lakheraj*, was of no evidentiary value.

Held, therefore, in the absence of proof of payment of rent at any time, that the lands were *lakheraj* and no part of the *mal* assets of zemindari or putni.

APPEALS under s. 15 of the Letters Patent by Bipradas Pal Chowdhury, the defendant, from the judgment of Teunon J.

* Letters Patent Appeals, Nos. 68, 69 and 70 of 1914, in Special Appeals Nos. 620, 622 and 722 of 1912.

The facts are shortly these. On the 2nd October 1899, the defendant abovenamed purchased a *patni taluk* comprising 38 mauzas of Taraf Santipur, a permanently-settled estate bearing No. 474 on the Revenue Roll of the Nadia Collectorate. The purchase was made at a sale held under the provisions of the Bengal Tenancy Act for arrears of revenue. Thereafter the purchaser commenced proceedings under Chapter X of that Act. The Record of Rights in respect of these mauzas was finally published on the 19th April 1909, and stated that no rent was actually paid but that the occupants were not entitled to hold without payment of rent. The latter thereupon instituted separate suits under s. 106 of the Bengal Tenancy Act, for a declaration that the lands in question were their rent-free *brahmottar* and that the entries in so far as they stated that the lands were liable to be assessed to rent were incorrect. They contended that the lands in suit had been granted to their predecessor in title by Maharaja Krishna Chandra Roy of Nadia to be free from payment of revenue; that the grant being non-Badshahi of a date prior to the 12th August 1765, had been duly registered under the provisions of sections 22 to 25 of Regulation XIX of 1793; that from the date of the grant they and their predecessors had been in continuous possession without payment of rent or revenue; that the lands in suit therefore were no part of the *mal* assets of the zemindari. The defendant on the other hand relied upon the omission of any indication of the lands in suit being *lakheraj* in the Pergana, Kanungo, General and Mauzawar Registers and Thakbast Maps and Statements. On the 15th March 1910, the Assistant Settlement Officer decided in the plaintiffs' favour. On appeal this decision was reversed by the Special Judge on the 29th March 1910. The plaintiffs, thereupon, preferred separate second

1917

BIPRADAS PAL CHOWDHURY v. MANORAMA DEBI.

appeals to the High Court. On the 1st June 1914, Teunon J. decided in their favour (excepting the appellant in S. A. No. 621), in the following terms:—

TEUNON J. These four appeals arise out of proceedings under section 106 of the Bengal Tenancy Act.

It appears that on the 2nd October 1899, the defendant-respondent, Mr. Bipradas Pal Chowdhury, became the purchaser of a putni taluk comprising the 38 mauzas of Taraf Santipur, a permanently-settled estate bearing No 474 on the revenue roll of the Nadia Collectorate. The purchase was made at a sale held under the provisions of the Bengal Tenancy Act, for arrears of rent and after the purchase proceedings were taken under Chapter X of that Act. In respect of the mauzas with which we are now concerned, the Record of Rights was finally published on the 19th April 1909.

In this record the entry in respect of the lands in question is that no rent is actually paid but that the occupants, *i.e.*, the plaintiff-appellants are not entitled to hold without payment of rent.

The plaintiffs thereupon instituted these several suits under section 106 of the Act to have it declared that the lands in question are their rent-free *brahmottar* and that the entries in so far as they state that the lands are liable to be assessed to rent are incorrect. The decision of the Settlement Officer in their favour has been reversed on appeal by the Special Judge and the plaintiffs now appeal to this Court.

In each suit the case of the plaintiffs was that the lands in question had been granted to their predecessors in title by Maharaja Krishna Chandra Roy of Nadia to be held exempt from the payment of revenue, that the grants being non-Badshahi grants, in each case of a date prior to the 12th of August 1765, had been duly registered in the manner provided in sections 22 to 25 of Regulation XIX of 1793, and that from the dates of the grants they and their predecessors had been in continuous possession without payment of rent or revenue, and that the lands in question were therefore no part of the *mal* assets of the zemindari, and so did not appertain to the putni purchased by the defendants.

It may be here observed that owing to the recusancy of the Maharaja of Nadia, Taraf Santipore was not permanently settled until the year $\frac{1207}{1799 \text{ or } 1800}$ when it was settled with Maharaja Tej Chandra Roy Bahadur of Burdwan who created the putni tenure in or about $\frac{1214}{1807}$.

From the periodical register or the draft thereof prepared apparently in the year $\frac{1202}{1795 \text{ to } 96}$ under section 29 of Regulation XIX of 1793, and spoken of in these proceedings as the "Taidad Register," the plaintiffs

have in each case produced the extracts referring to the grant on which they rely.

In appeal 620, which relates to plot 234 of the Survey and Settlement Papers of mauza Malipota, measuring 1 bigha 12 cottahs 1 chattack, the entry or *taidad* No. is 7248, being the record of a grant of 2 bighas *bastu* in Malipota and of 50 bighas in three other villages.

In appeal 621, in which we are concerned with plot No. 2-464 of the Record of Rights, measuring 1 bigha 3 cottahs 9 chattacks, the *taidad* No. is 318, being the entry of a grant of 5 bighas 5 cottahs in Malipota and of 4 bighas 18 cottahs in an adjoining village, Sat Pukhuria.

In appeal 622, the area in question 13 cottahs 5 chattacks has been shown in the Record of Rights of Malipota as plot No. 228-451 and the *taidad* relied on is No. 5932 which purports to comprise 150 bighas 16 cottahs in five (5) villages, 28 bighas 16 cottahs being in Malipota.

Appeal 722 relates to plot 310 of the Record-of-Rights of mauza Pumulia, a village adjoining Malipota on the south, and the *taidad* is No. 2247, the entry of a grant comprising 35 bighas in Pumulia, 18 bighas in Malipota and 34 bighas in two other villages.

The learned District Judge has found that the plaintiffs have failed to identify the lands in suit with the lands comprised in the *taidads* on which they rely, that they have also failed to show a continuous line of descent (by inheritance or purchase) from the original grantees of the *sanads* and that they have therefore failed to rebut the presumption arising against them under section 103B (*3*) of the Bengal Tenancy Act.

He has further found that inasmuch as the lands or tenures in question are not shown as *lakheraj* in (i) the Pergana Register prepared under sections 2 and 3 of Regulation VIII of 1800, (ii) the Kanungo Register or account kept under the provisions of Regulation I of 1819 read with section 7 of Regulation V of 1816, (iii) the General and Mauzawar Register kept under the Land Registration Act (Bengal Act VII of 1876), and (iv) the Thak Maps and Statements of the mauzas in question, which have been produced by the defendant, the defendant has succeeded in showing affirmatively that the lands in suit are the *mal* lands of the zemindari and of the defendant's putni.

The contention of the appellants then are (*i*) that the District Judge has wholly misconceived the probative effect or value of the registers and maps to which he refers and (*ii*) that he has wholly overlooked the presumption arising from long and uninterrupted possession.

We may consider the several registers one by one.

For translations of extracts from Part II of the Pargana Register, I have been referred by the parties to pages 25 to 28 of the paper book in second appeals 1717 and 1719-21 of 1909.

1917

BIPRADAS PAL CHOWDHURY v. MANORAMA DEBI.

TEUNON J.

No doubt the intention of Regulation VIII of 1800 (V. S. 2) was that the Pargana Register should be exhaustive in both its parts (*malguzari* and *lakheraj*). But the preamble and also sections 18 and 19 of the Regulations show plainly that the provisions of Regulation XIX of 1793 and of the corresponding Regulation XXXVII of 1793 applicable to Badshahi grants, had not been duly observed, and that the preparations of the Periodical Registers therein prescribed was in arrears. There is no reason to suppose that the work of preparing the Pargana Register which was to supersede the Periodical Register was more punctiliously carried out, and that the Pargana Registers were in fact incomplete is recognized in the Land Registration Act of 1876, see for instance the preamble and section 20. Moreover the 4th clause of section 3 of Regulation VIII of 1800, provides that the entries in the register or registers prepared under sections 29 and 30 of Regulation XIX of 1793 or the essential portions of such entries should be repeated in the Pargana Register. The register itself shows that this was not done and the only entries in the *lakheraj* part appear to be entries of lands released as valid *lakheraj* as the result of resumption proceedings taken at the instance of Government in or about the years 1840—1843. Of the omission of other *taidads* for instance the *taidad* relied on in the present proceedings we have no explanation and there is no suggestion in the evidence that any proceedings to have these *taidads* declared invalid or for the resumption of the lands comprised therein were at any time taken either by Government, zemindar or the putnidar.

It follows that the *lakheraj* portion of the Pargana Register was never duly prepared, and that the omission from it of the lands or tenures now in question is of no evidentiary value.

The next register is the so-called Kanungo Register, apparently of the year $\frac{1232}{1825}$ and for a translation of this register I have been referred to the same paper book, pages 4 to 18. By Regulation V of 1816, applicable to the district of Cuttack, and some portion of the district of Hidjli, kanungoes were to be appointed in every pargana and by the second clause of section 7 the kanungos were required "to keep an account of all lands held under *rent-free* tenures, and to report to the Collector all escheats of such lands to Government."

By Regulation I of 1819 the provisions of Regulation V of 1816 were extended to the Province of Bengal in general and it would seem that under this Regulation a kanungo was appointed for pargana Taraf Santipore or for the whole district of Nadia, but as to the manner in which he performed the duties laid upon him by the second clause of section 7 of Regulation V we have no information. It is by no means clear that the word "account" implies a register or that the section requires the kanungo

to prepare and maintain a complete register of rent-free tenures. The appointment was intended primarily to facilitate the collection of the public revenue and in the case of lands held rent or revenue-free not exceeding 100 bighas in area (*vide* Regulation XIX of 1793, section 6), the revenue could be benefitted only when from failure of heirs or otherwise the tenures escheated or were forfeited to Government. It was sufficient then that the kanungo should report any such occurrence. To enable him to do this copies of the register kept at headquarters would be more appropriate than an independent register. Moreover, the column in the kanungo's " account " or register headed " name of *lakherajdar* as entered in the *sherista* of the zemindar," though this column appears to be blank, possibly suggests that he took notice only of such tenures as the zemindar had chosen or been induced formally to recognize. It is in any case quite clear that from his register or account he omitted the great bulk of the grants registered in the periodical or *taidad* register, and in the absence of any evidence of resumption proceedings whether from records or from the intermediate registers, prepared, if they were prepared, under Regulation XIX of 1793, section 33, or Regulation VIII of 1800, section 5, these omissions remain unexplained. In this state of things it appears clear that the omission of the lands or tenures in question from the kanungo's account is also of no value to the defendant.

We have next the registers of revenue-free lands maintained under Bengal Act VII of 1876, and with regard to these registers it is sufficient to say that the District Judge has wholly misapprehended the provisions of sections 10, 33 and 89 of the said Act. It is not suggested that the grants or tenures in question have ever been up to now the subject of judicial proceedings or of any report to the Board of Revenue or declared valid by competent authority. Obviously, therefore, they could not find a place in the register of revenue free lands, and their omission therefore is of no significance.

We then come to the thak map of 1852 and the statements endorsed thereon.

In this connection I have been referred to the "Thakbust and Khasrah Rules" issued by the Board of Revenue to Commissioners with their Misc. No. 829 of 8th October 1850, and reproduced in Appendix X to James Henry Young's Revenue Hand Book, published in the year 1855 and also reproduced in part in Appendix B at page 81 of Captain Hirst's notes on the "old revenue survey of Bengal." The 10th rule (*vide* Young's Hand Book) requires that in future the thakbust is to embrace not merely the village boundaries but also the demarcation of the boundaries of each independent mahal in the village ; Rule XI then provides that the independent mahals entitled to distinct entry on the thakbust

1917

BIBADAS PAL CHOWDHURY v. MANORAMA DEBI

TEUNON J.

maps are, *inter alia*, "4th confirmed *lakheraj* tenures, *i.e.*, tenures confirmed on trial and tenures not subjected to trial, the title being considered good," and "6th Blocks of land relinquished under the orders not to assess holdings under 50 bighas".

It may be here observed that except in appeal No. 622, the *taidads* or grants relied on comprise each an area not exceeding 100 bighas, and that in each case the area within Malipota (or Pumulia) is less than 50 bighas. Under the Regulation V, sections 6, 7, 10 and 11 of Regulation XIX of 1793, and sections 3 and 30 of Regulation II of 1819, the right to resume and recover the revenue assessed on grants not exceeding 100 bighas was with the zemindar (or putnidar) and not with Government. Moreover, the orders of Government, dated 26th January and 28th April 1841 (*vide* Young's Hand Book, p. 67), directing the discontinuance of resumption proceedings in the case of grants of less than 50 bighas extended also to grants exceeding in the aggregate 50 bighas but made up of parcels of land each of which was less than 50 bighas.

It was never intended that the thakbust authorities should enter into questions between zemindars and tenants and Government could not impose upon zemindars its opinion as to title or its orders as to grants of small areas.

It is then important to observe how Rule XI of the Thakbust Rules was understood and acted upon by the thakbust officers. From the thak statement we find that a number of questions was put to the agents of the zemindars and putnidars and of these the second runs thus :—"To which pargana does the abovementioned village appertain . . . . besides these (*a*) are there within these boundaries (*i.e.*, the village boundaries) any *Bajyapti* (*i.e.*, resumed) lands either *char* or *lakheraj* which have not been included in (any) the *tauzi* up to this date, or (*b*) are there any lands of the above description (*i.e.*, *char* or *lakheraj*) which have been released from the claim of Government for rent (revenue)? or (*c*) is there any *lakheraj* land in the village which has been exempted from the payment of Government revenue at the time of resumption and settlement because it is less than 50 bighas, if there be any, what is the number of the suit, and date and year of the decree ; (*d*) besides these within these boundaries are there any *lakheraj* lands . . . . covered by a sanad and measuring more than 100 bighas against which no claim by Government has been preferred up to this date . . . .".

Of this question or series of questions the portion which I have marked (*a*) refers to the 3rd class of rule XI, *i.e.*, resumed tenures, the second marked (*b*) to the tenures confirmed on trial in the 4th class, the third marked (*c*) to the 6th class, *i.e.*, blocks of land relinquished under

the orders not to assess holdings under 50 bighas and the fourth marked (*d*) apparently to the tenures in the 4th class "not subjected to trial, the title being considered good."

It will be observed that in each case the question refers to Government demands and to lands which had been or (in the case of the 4th) might appropriately have been the subject of litigation with Government. Moreover, where area is considered the question is as to the area within the village. In the result in the map of Malipota, a plot of land measuring 8 bighas 8 cottas released in suit 447 by the order of the special (*i.e.*, Resumption) Deputy Collector, dated 24th December 1840, was measured as *lakheraj* and delineated in chak No. 1 and as to the rest the zemindars or putnidars' amlah said as they might be expected to say that there was no other *lakheraj* in the village. No reference was made to the *taidad* Register, though there is no suggestion in the evidence that lands comprised in the *taidads* had been at any time resumed, and the representatives of the original grantees were not treated as concerned or called upon to sign the Thakbust (*vide* Rule XXIV) or state their objections. In other words any lands held as *lakheraj* or rent-free which the zemindar might possibly seek to resume, even those shown in the kanungo's "account", were included within the limits of the estate.

It follows that in the determination of the questions arising in these present proceedings the omissions from the Thakbust Maps of any indication of *lakheraj* lands (other than lands which had been the subject matter of litigation) is also of no evidentiary value.

It follows that the District Judge's finding that the defendant has succeeded in proving affirmatively that the lands in question are the *mal* lands of his patni is based on no evidence.

The defendant is then left with the presumption arising in his favour from section 103B (*3*) of the Bengal Tenancy Act and the fact that the lands are within the ambit of his putni and of the superior estate.

The second question that arises in these appeals then is whether the plaintiffs have succeeded in rebutting the presumption created by section 103B of the Bengal Tenancy Act.

The learned District Judge has found that the plaintiffs have failed to show that the lands in question are comprised within the several grants or *taidads* on which the plaintiffs rely. He has also found that they have also failed to trace their descent or succession in interest from the original donees. But being apparently under the impression that a *lakheraj* title could be established only by production and proof of a grant or title-deed he has omitted to consider or discuss the evidence of possession and come to any finding as to the duration in each case of the possession of the plaintiffs free from payment of rent. To

1917

BIPRADAS PAL CHOWDHURY v. MANORAMA DEBI.

TEUNON J.

avoid the necessity of a remand, with the assent of the parties, I therefore decided to proceed under section 103 of the Code of Civil Procedure, and to determine in this Court the necessary issue of fact. For this purpose the whole evidence as to possession in each case has been placed before me.

In appeal 620, two witnesses, one a man of 52, and one a man of 82 were examined, though in a very cursory manner for the plaintiffs. From their evidence it appears that the plaintiff and her father before her have been in possession at least from 1891 when the plot was purchased in the name of one Pramanik as the *brahmottar* property of certain Mukherjis. Moreover, the witnesses prove that the homestead plot in question is known as "Lakhi Kanta's homestead" and the *taidad* (7248) shows the 2 bighas in Malipota as *bastu* and one Lakhi Kanta Banerji as the persons in possession at the time (1790-92) when the grant was registered (1795-96).

In appeal No. 621, the only oral evidence is that of a young man of 24. Two *kabuliats* produced refer to a different and not adjoining village named Fulia. In the deed of sale exhibited, the year 1227 in words and figures has been obviously altered from 1225, yet the stamped paper on which the document is written was sold in 1820 (1227). Moreover, the first three lines are in one ink: the remainder in a different ink, the original 1225 is in the first ink, the altered "seven" and "7" in the latter ink. Clearly this document is a forgery.

In appeal No. 622 we have 3 witnesses, namely, Dina Nath Mukherji, aged 52, Moti Lal Roy, aged 75, and Panchu Chamar, a man of 30. All these witnesses speak of the possession of the plaintiff and his ancestors of this *lakheraj* homestead for the period to which the memory of each witness extends, in the case of Moti Lal Roy, 50 years. Moreover, the first two witnesses prove the descent of the plaintiff from Bhaba Sankar, one of the persons named in the *taidad* (5932) as in possession when the grant was registered. In this case therefore the observation of the District Judge that "there is a total absence of evidence to establish the complete chain from the donees to the present holders" is wholly erroneous.

In appeal No. 722, Dino Nath Mukherji, 52 years of age, and one of the plaintiffs, Gobinda Lal Mukherji, a man of 41, have been examined. The plaintiff produces a sale certificate (Ex. 1) by which in 1835 his grandfather, Bodan Chandra, purchased in execution of a decree against one Ram Prosad Bhattacharjee, (the original grantee in *taidad* 2247 being Ram Kanai Tarkabagis, *i.e.*, Bhattacharji). He next produces a sub-lease of the year $\frac{1}{8}\frac{2}{7}\frac{9}{2}$ (Ex. 2), identifies the garden or orchard now in question with the *lakheraj* garden referred to in the sale certificate and in the sub-lease, and says that it has been in the hands of his family from the year 1835 to the present day. In these statements he is corroborated by the witness Dino Nath Mukerji who speaks of a period of 40 years.

In none of the appeals has the defendant adduced any oral evidence.

On the evidence thus reviewed, I find that the plaintiffs have succeeded in proving possession, free from payment of rent, in appeal No. 722 from the year 1835, in appeal No. 622 for a period of 50 years before suit, and in appeal No. 620 from the year 1891. In appeal No. 621 no evidence of possession for any definite period has been given, and in this appeal, therefore, it cannot be said that the presumption arising under section 103B of the Bengal Tenancy Act has been rebutted. In the other appeals the proved possession free from payment of rent is in my opinion sufficient to rebut the presumption arising from the second portion of the entry in the Record of Rights to the effect that the lands are liable to be assessed to rent.

It is then for the defendant to give evidence that the lands in question were at one time *mal*. As pointed out in the case of *Hurryhur Mookhopadhya* v. *Madub Chunder Baboo* (1) he may do this by proving by documentary or other evidence that the lands in question formed part of the *mal* assets of the estate at the decennial settlement or at the time when the estate was permanently settled (in this case 1800), or by proving payment of rent at some time since that date. By the production of registers and thak maps discussed in the first part of the judgment he has attempted to prove that the lands in question were in 1799-1800 part of the *mal* assets of the estate. In this attempt, in my opinion, he has failed. He has made no attempt to prove payment of rent at any time. It is said that he could make no such attempt because he is an auction purchaser. But he has examined no one to explain his difficulties, if any, or even to tell us who the defaulting putnidars or their predecessors in interest were. From the written statements in fact it would seem that the defendant accepted the position that owing to the *laches* of the previous putnidar, rents in respect of the lands in suit had never been realized. In any case from the positive evidence that the lands in question are and have been held free from payment of rent, and the failure on the part of the defendant to make any attempt to prove payment of rent at any time, we may safely conclude that in respect of the lands in question in the three appeals with which I am now dealing no rent has ever been paid either to zemindar or putnidar.

I, therefore, hold that the lands in suit in appeals Nos. 620, 622 and 722 are *lakheraj* and no part of the *mal* assets of the zemindar or of the defendant's putni.

I have lastly to notice an objection taken by the respondent in appeal No. 722. It appears that the appeal was filed within time on the 10th July

(1) (1871) 14 Moo. I. A. 152.

1917

BIPRADAS PAL CHOWDHURY v. MANORAMA DEBI.

TEUNON J.

1911. On the 1st March 1912 the officer of the Court reported that the court-fee paid was insufficient, and thereupon, for payment of the deficit, on the 13th day of March, 2 days' time was allowed. The deficit was in fact not paid till the 16th, that is one day too late. It is therefore contended that the appeal is barred by limitation, but it is open to the Court to enlarge the period, and accordingly granting the necessary extension, I accept the payment of the 16th March 1912 as within time.

In the result, appeal No. 621 is dismissed with costs. In appeals Nos. 620, 622 and 722 the plaintiffs will have in each case a declaration that the lands in suit are rent-free *brahmottar* and that the entry to the contrary in the Record of Rights is incorrect. These appeals are accordingly decreed with costs.

The defendant, thereupon, preferred these appeals under the Letters Patent.

Babu Mahendra Nath Roy and *Babu Amarendra Nath Bose*, for the appellant.

Babu Rupendra Kumar Mitter, for the respondents.

MOOKERJEE AND WALMSLEY JJ. We see no reason to differ from Mr. Justice Teunon in the view that he has taken of the rights of the parties in these cases. The appeals are, therefore, dismissed with costs.

L. R. *Appeals dismissed.*

CIVIL RULE.

Before Chitty and Smither JJ.

NANDA LAL GANGULI 1918

v. *Jan.* 28.

KHETRA MOHAN GHOSE.*

Sanction for Prosecution—"Court"—"Court of Justice"—Calcutta Improvement Tribunal, whether a "Court"—Criminal Procedure Code (Act V of 1898), s. 195—Calcutta Improvement Act (Beng. V of 1911), ss. 70, 71 (a), (c) and 77, as amended by the Calcutta Improvement (Appeals) Act (XVIII of 1911)—Evidence Act (I of 1872), s. 3.

The word "Court" in s. 195 of the Criminal Procedure Code has a wider meaning than "Court of Justice" under s. 20 of the Penal Code, and includes a tribunal entitled to deal with a particular matter and authorized to receive evidence bearing thereon in order to enable it to arrive at a determination upon the question.

Raghoobuns Sahoy v. *Kokil Singh* (1) and *Chandi Charan Giri* v. *Godadhar Pradhan* (2) referred to.

The Tribunal constituted by the Calcutta Improvement Act (Beng. V of 1911), as amended by the Calcutta Improvement (Appeals) Act (XVIII of 1911), is a "Court", within the meaning of s. 195 of the Criminal Procedure Code.

Hari Pandurang v. *Secretary of State for India* (3) distinguished.

THE facts of the case were as follows:—

By a notification in the *Calcutta Gazette* the Land Acquisition Collector acquired the premises Nos. 109 and 117, Russa Road. Thereupon Nitto Kali Debi, Mahendra Chunder Ganguli and the petitioner, Nanda Lal Ganguli, preferred claims to the properties, and the Collector referred the cases under s. 18 of the Land

* Civil Revision No. 2 of 1918, against the order of the President of the Calcutta Improvement Tribunal, dated Dec. 6, 1917.

(1) (1890) I. L. R. 17 Calc. 872. (2) (1917) 22 C. W. N. 165.
(3) (1903) I. L. R. 27 Bom. 424.

1918

NANDA LAL GANGULI v. KHETRA MOHAN GHOSE.

Acquisition Act (I of 1894) to the President of the Tribunal constituted under the Calcutta Improvement Act (Beng. V of 1911).

The cases, entitled *Apportionment Cases Nos. 147 and 148 of 1917*, were heard together by the President sitting alone, and the opposite party, Khetra Mohan Ghose, was examined in the proceedings as a witness on behalf of Nitto Kali; and in his examination and cross-examination, on the 14th and 15th September, 1917, stated that he had not mortgaged any property of his, which statement was alleged to be false.

An application was, thereupon, made to the President for sanction to prosecute Khetra Mohan for giving false evidence in a judicial proceeding under s. 193 of the Penal Code. The President refused the application, on the 6th December 1917, on the ground that the Tribunal was not a "Court" within the meaning of s. 195 of the Criminal Procedure Code. The petitioner then moved the High Court and obtained the present Rule on the President of the Tribunal.

Babu Atulya Churn Bose (with him *Babu Manmatha Nath Pal*), for the petitioner. The word "Court" has a very wide meaning: see *Raghoobuns Sahoy* v. *Kokil Singh* (1), and *Chandi Charan Giri* v. *Godadhar Pradhan* (2). The Validating Act (Beng. XVIII of 1911) has conferred all the powers of a Court upon the Tribunal and made it a "Court within s. 195 of the Criminal Procedure Code".

Babu Manmatha Nath Mukherjee, for the opposite party. The Tribunal is not a "Court", though endowed with all the functions of a Court for specific purposes: *see* the language of s. 71 of the Calcutta Improvement Act—"*shall be deemed to be the Court.*"

(1) (1890) I. L. R. 17 Calc. 872. (2) (1917) 22 C. W. N. 165.

1918

NANDA LAL GANGULI v. KHETRA MOHAN GHOSE.

[Refers to ss. 70—77 of the Act]. The reasoning of Jenkins C. J. in *Hari Pandurang* v. *Secretary of State* (1) still stands, notwithstanding the amendment. The Validating Act (Beng. XVIII of 1911), s. 2, makes a distinction between "Court" and "Tribunal". The mention of s. 54 of the Land Acquisition Act in s. 71 of the Calcutta Improvement Act merely relates to the powers of the Tribunal and does not constitute it a "Court" for all purposes: see *Naresh Chandra Bose* v. *Hira Lal Bose* (2). The definition in s. 3 of the Evidence Act does not help, as an authority may be empowered to take evidence without being a "Court": *see* in this connection s. 4 of the Oaths Act (X of 1873).

Cur. adv. vult.

CHITTY J. An application was made to the President of the Tribunal constituted under the Calcutta Improvement Act, 1911, for sanction to prosecute one Khetra Mohan Ghose for giving false evidence before the President of the Tribunal in two apportionment cases. The President held that he had no jurisdiction to entertain the application on the ground that the Tribunal was not a "Court" within the meaning of section 195 of the Criminal Procedure Code. Against that decision the applicant obtained this Rule, and Khetra Mohan Ghose has appeared by pleader and shown cause against it. The opinion of the President appears to be based upon the decision in *Hari Pandurang* v. *Secretary of State* (1), where it was held that the Bombay Tribunal was not a Court but merely a body of arbitrators not subject to the supervision of the High Court. It was, no doubt, on account of this decision that Act XIV of 1904 was passed by the Imperial Legislative Council. In the case of Calcutta, the Tribunal is constitued by the

(1) (1903) I. L. R. 27 Bom. 424. (2) (1915) I. L. R. 43 Calc. 239.

1918

NANDA LAL GANGULI v. KHETRA MOHAN GHOSE.

CHITTY J.

Calcutta Improvement Act, 1911, but the finality of its decisions is regulated by that Act as modified by the Calcutta Improvement (Appeals) Act, 1911, passed by the Imperial Legislative Council. It is unnecessary for us to discuss the question whether in view of the subsequent legislation the Bombay decision is still good law, as we have no doubt whatever that the Calcutta Tribunal is a "Court" within the meaning of section 195 of the Criminal Procedure Code. By section 70 of the Calcutta Improvement Act, the Tribunal is constituted for the purpose of performing the functions of the Court in reference to the acquisition of land for the Board under the Land Acquisition Act, 1894. By section 71 (*a*) the Tribunal shall (except as to appeals which are specially provided for) be deemed to be the Court and the President the Judge under the said Act. Section 71 (*c*) gives the President the powers of a Civil Court with regard to the summoning and attendance of witnesses and production of documents. By section 77 (*b*) apportionment cases may be tried by the President sitting alone, and his decision is then to be deemed to be the decision of the Tribunal.

It has been held by this Court that the word "Court" in section 195 has a wider meaning than a "Court of Justice" as defined in the Indian Penal Code. It may include a tribunal empowered to deal with a particular matter and authorised to receive evidence bearing on that matter in order to enable it to arrive at a determination. See *Raghoobuns Sahoy* v. *Kokil Singh* (1), where the question arose whether a Collector acting under sections 69 and 70 of the Bengal Tenancy Act was a Court. That case was followed in *Chandi Charan Giri* v. *Godadhar Pradhan* (2), where the question was to what Court the Collector was

(1) (1890) I. L. R. 17 Calc. 872. (2) (1917) 22 C. W. N. 165.

subordinate. We may also refer to the definition of "Court" in section 3 of the Evidence Act. It includes all Judges and Magistrates, and all persons except arbitrators legally authorised to take evidence.

We do not think that the Tribunal as "the Court" under the Land Acquisition Act, 1894, for the purposes of the Improvement Trust, can be regarded simply as a body of arbitrators. It is *the* Court under that Act, and the President is the Judge. It follows that it must also be regarded as a Court for the purposes of section 195 of the Criminal Procedure Code. We may point out that if the contrary view were to prevail, the deplorable result would follow that any private person who alleged that false evidence had been given before the Tribunal might institute a prosecution without any control on his action by the Tribunal before whom the evidence was given.

The Rule is accordingly made absolute, the order of the President is set aside, and the application remanded to him for adjudication upon the merits.

SMITHER J. concurred.

E. H. M. *Rule absolute.*

PRIVY COUNCIL.

AMRIT NARAYAN SINGH

v.

GAYA SINGH.

P. C.* 1917

Oct. 18, 19; *Nov.* 22.

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL].

Hindu Law—Reversioner—Rights of reversioner—Suit to recover property of grandfather alienated during infancy of next reversioner to agnates of deceased—Compromise by female owner and her husband – Award in terms of compromise—Award made decree of Court under Act VIII of 1859, s. 327—Limitation Act, 1877, Sch. II, Arts. 95, 141—Guardian of minor

A Hindu reversioner has no right or interest *in præsenti* in the property which the female owner holds for her life. Until it vests in him on her death, should he survive her, he has nothing to assign, or to relinquish, or even to transmit to his heirs. His right becomes concrete only on her demise; until then it is a mere "*spes successionis*". His guardian, if he happens to be a minor, cannot bargain with it on his behalf, or bind him by any contractual engagement in respect thereto.

On the death without issue of a Hindu governed by the Mitakshara law, and admittedly separated from his agnatic relations (respondents) leaving a widow, a daughter *K*, and his daughter's son, a minor (appellant), the widow though opposed by the agnates obtained possession of her husband's property for her life estate. On her death in 1864, a dispute arose with the agnates as to *K*'s right to succeed, in which her husband *R* took part as representing *K*, though there was nothing to show that he had any authority to act as her agent. The matter was referred to arbitration, but before the arbitrators had taken any action a compromise was come to in which *R* purported to act for *K* and her infant son, the effect of which was to completely extinguish the reversionary interest of the appellant in his grandfather's estate. The arbitrators made an award in accordance with the terms of the compromise. It was not shown that the proceedings before the arbitrators ever came to the knowledge of *K*, but it appeared that she did not acquiesce in the award, and the agnates

* *Present*: LORD PARKER OF WADDINGTON, LORD WRENBURY, SIR JOHN EDGE, MR. AMEER ALI, AND SIR LAWRENCE JENKINS.

had to apply to have it made a decree of Court under section 327 of Act VIII of 1859, the then Code of Civil Procedure ; and notwithstanding *K's* continued opposition such a decree was made and enforced, and the respondents were put into possession of the properties in 1865. *K* died in 1905, and in 1908 the appellant brought a suit to set aside the arbitration proceedings together with the compromise and award as being fraudulent and taken and entered into without the knowledge or authority of *K*, and for a declaration that he was not bound by them.

Held (reversing the decision of the High Court), that until *K's* death the appellant had no right or interest in the properties which could be the subject of bargain : *R's* action in referring to arbitration any matter connected with the appellant's reversionary right was, therefore, null and void. The award was based on the compromise, and even if the appellant had had an existing right, *R* would have had no power to enter into an arrangement which extinguished his interest practically without consideration. The compromise too was not for the benefit of the minor. The decree enforcing the award was based on the finding that *K* had, by her husband *R*, acquiesced in the reference to arbitration, and that she had consented to the compromise, and was therefore bound by the award : the order of the District Judge which was affirmed by the High Court affected *K's* interest and hers only. The minor was not a party to the appeal to the High Court, and the Civil Courts did not in any way purport to deal with or adjudicate upon his reversionary right. The proceedings therefore culminating in the decree by which the appellant was sought to be bound, were entirely devoid of the conditions on which alone a reversioner can be shut out from the assertion of his right which comes to him altogether independently of the female owner.

Kattama Natchiar v. *Rajah of Shivagunga* (1) distinguished.

APPEAL 8 of 1916 from a judgment and decree (15th July 1913) of the High Court at Calcutta, which reversed a judgment and decree (20th January 1909) of the Court of the Subordinate Judge of Patna.

The plaintiffs were the appellants to His Majesty in Council.

The suit which gave rise to this appeal related to the estate of one Jhamman Singh, a Hindu governed by the Mitakshara law, who died on August 1862 leaving a widow, Radha Koer, a daughter, Kar Koer,

(1) (1863) 9 Moo. I. A. 539, 604.

1917

AMRIT NARAYAN SINGH v. GAYA SINGH.

and the present appellant Amrit Narayan Singh, his daughter's son, then a minor. The widow died in September 1863, and Kar Koer on 1st April 1905, when the right accrued to the appellant to obtain possession of his grandfather Jhamman Singh's estate, which was in the possession of the defendants (respondents) who were distant collaterals of Jhamman Singh.

The appellant accordingly, on 17th February 1908, filed the present suit for that purpose.

The defendants denied the plaintiff's claim. Stating that after Jhamman Singh's death they opposed the claim of Radha Koer, the plaintiff's grandmother, and Kar Koer his mother to succeed Jhamman Singh; that in November 1863 Kar Koer and Rajender Singh, the father of the plaintiff, referred the dispute to arbitration; that in the course of the arbitration proceedings, Rajender Singh and Kar Koer executed a compromise by which the title of the defendants was recognised; that the arbitrators made an award in terms of the compromise; and that the award was finally made a decree of Court by the High Court in 1865, and that the defendants had held possession of the property left by Jhamman Singh in terms of the award.

The case of the plaintiff was that these proceedings were taken during his minority, and that he was not bound either by the compromise nor by the award, nor by the decree made in terms of the award.

The Subordinate Judge decided in favour of the plaintiff. On appeal, the High Court (CHITTY and TEUNON JJ.) reversed that decision and dismissed the suit.

The judgment of the High Court was as follows:

"Jhamman Singh was a member of a family governed, except for the existence of any special custom, by the Mitakshara school of Hindu Law.

He died on 24th August 1862, leaving a widow Radha Koer, a daughter Kar Koer and the present plaintiff his daughter's son. The principal defendants are the successors in interest of the agnatic relations of Jhamman Singh. Immediately upon his death those relations claimed the properties as against his widow and daughter. They appear to have set up a custom as prevailing in their community that the agnatic relations were entitled to succeed in preference to the widow and daughter. They also set up a case that Jhamman Singh had been a member, with them, of an undivided joint Hindu family. But it is very doubtful whether this was the case ; at any rate, the appeal in this Court has proceeded on the assumption that Jhamman Singh was separate.

"On Jhamman Singh's death, his widow Radha Koer, on 12th May 1863, applied to have her name registered in respect of certain of the properties left by Jhamman Singh. The relations of Jhamman Singh objected, their petition being dated 11th June 1863, to which Radha Koer replied on 2nd July 1863. The Assistant Collector recommended that the petition should be dismissed, but the Collector, on 11th July 1863, allowed the registration of Radha Koer's name on the ground that her claim to possession was better than that of the predecessors of the defendants ; while, on the question of title, he directed that the parties should go to the Civil Court. Besides this registration case, there were other disputes between the parties, resulting in recourse to the Criminal Court. On 28th September 1863, Radha Koer died and on 2nd November 1863 Kar Koer and her husband Rajender Singh purporting to act as the guardian of his minor son, the present plaintiff, agreed to refer the matters in dispute to the arbitration of five persons. This submission to arbitration (Ex. G) was signed by Rajender for his wife and also as father and guardian of the minor Amrit Narayan Singh ; on the other side, it was signed by Bandhu Singh and others. We have in evidence the statement of the case of Mussummat Kar Koer (Ex. R) and the petition of both Kar Koer and Rajender Singh as guardian of the minor, supplying a list of their witnesses. Before the arbitrators the parties appear to have come to terms ; and petitions of compromise, dated 18th November 1863, were filed before the arbitrators by Kar Koer and Rajender Singh as father and guardian of the minor on the one side, and Bandhu Singh and others on the other (Exs. T and U.). The arbitrators made their award, dated 20th November 1863 (Ex. K). In that award they proceeded not only upon the petitions of compromise but also on their own view of the case. The award was against Kar Koer and her son, the arbitrators finding that the first party, *i.e.*, the predecessors of the present defendants were the Sapinda Gotias of Jhamman Singh and that according to the religion, custom and usage obtaining among them the right of inheritance did not devolve upon the widow, daughter and

1917

AMRIT NARAYAN SINGH v. GAYA SINGH.

daughter's son, but that the widow was only entitled to maintenance. By consent, however, the first party took 2 annas 18 dams in mouza Ghauspur, and 5 dams odd of mouza Mokawan, while the second party, *i.e.*, Kar Koer and her son, remained in possession of the remaining 10 cowris share in mouza Mokawan and 2 annas thicca interest in mouza Bijri with dwelling houses, household effects, etc.

"An application was then made by the predecessors of the defendants to the Civil Court, under section 327 of Act VIII of 1859, to have the award made a decree of Court. The case was registered as a suit, the predecessors of the defendants being the plaintiffs and Kar Koer and her son by his guardian Rajender Singh being the defendants. The matter came on before the Principal Sadar Amin who decided against the plaintiffs and held further that the award was clearly detrimental and disadvantageous to the defendants.

"From that decision the plaintiffs appealed to the District Judge, and on 9th August 1864 the District Judge gave judgment reversing the decision of the lower Court, and decreeing the plaintiffs' claim to have the award filed and enforced under section 327. The District Judge proceeded on the ground that though Kar Koer denied the reference to arbitration, that was clearly proved against her, and that there were no other grounds made out before him on which the award could be set aside. Against the decision of the District Judge Kar Koer appealed to this Court, and, on 20th April 1865, her appeal was dismissed. To that appeal she made the predecessors of the defendants, the plaintiffs in the arbitration proceedings, parties respondents. She did not, however, so far as we can find, make her minor son a party respondent. The only question before the High Court was whether Kar Koer had in fact submitted to arbitration That having been found against her, this Court held that the award must be enforced. It appears from the judgment of the High Court that the *bonâ fides* of the arbitration was not questioned. There was an application for review to this Court which was considered and dismissed on 18th July 1865. The predecessors of the defendants were put into possession under the decree on 14th June 1865, and when the Registration Act came into force their names were duly registered on 1st July 1878, in spite of the objections of the present plaintiff, who had then obtained his majority. The defendants, or their predecessors have, ever since 1865, been in possession of the properties in question, without any objection on the part of Kar Koer. Kar Koer died on 1st April 1905 and on 17th February 1908 the plaintiff filed the present suit.

"The learned Subordinate Judge has passed a decree in favour of the plaintiff, going into the question whether Jhamman Singh was joint or separate from his agnatic relations, and also going into the other questions

relating to the submission to the award, the award, and the decree which followed it. Even if it were open to us to do so, it is unnecessary to consider whether Jhamman Singh was joint or separate from his agnatic relations. We may assume, for the purposes of this appeal, that he was separate.

"The questions arising for our determination are, (i) whether Rajender Singh had power to refer the matter on behalf of his minor son to arbitration; (ii) whether the plaintiff was properly represented in the proceedings in the Civil Court, under section 327 of Act VIII of 1859; and (iii) if he was, whether he can now treat the decree, which was based upon the award, as a nullity, and claim possession of these properties at this distance of time.

"It should be stated that in his plaint the plaintiff distinctly alleged that his father Rajender Singh, in the arbitration proceedings, was acting in collusion with the opposite party and did so in fraud of both his mother and of himself. There is absolutely no evidence to support such a case; and in this Court it has not been contended that Rajender Singh was guilty of fraud upon his wife and son, though the learned counsel for the plaintiff argued that he was grossly negligent of his son's interest.

"As to the reference to arbitration, we may at once say that in our opinion Rajender Singh had ample power, as the *de facto* and *de jure* guardian of his minor son, to refer the matter in dispute to the arbitration of the five individuals named. This is supported by a long series of authorities, and we need only refer to the case of *Ramji Ram* v. *Saliq Ram* (1) where the subject is discussed at considerable length by Mr. Justice Mookerjee. That being so, we must hold that there was a valid submission to arbitration both by Kar Koer and her infant son. The proceedings before the Courts clearly show that Kar Koer had authorized her husband to act for her in the matter of the submission.

"That being the case, we come to the questions arising on the proceedings under section 327, which are whether the minor was properly represented in those proceedings and whether the submission was for his benefit. It was argued for the respondent that there was no order in the case appointing Rajender Singh as guardian *ad litem* of his minor son. It was said that, under Act VIII of 1859, it was essential that there should be a certificated guardian appointed under section 3 of Act XL of 1858. There is certainly no such order as that upon the record, and we may, for purposes of argument, assume that no such order was made. Under Act VIII of 1859, there were no formalities prescribed for suits by or against minors. The only procedure laid down was that prescribed by

(1) (1911) 14 C. L. J. 188.

1917

AMRIT NARAYAN SINGH v. GAYA SINGH.

section 3 of Act XL of 1858. By that section, however, it appears that it would not be absolutely necessary to have a certificated guardian ; when the property was of small value, or for any other sufficient reason, the Court might allow any relative of a minor to defend a suit, although a certificate of administration had not been granted to such relative. It may be noted that, in this case, the suit was valued at only Rs. 178 and might very well, therefore, fall within the provisions of the latter portion of that section. However this may be, there can be no doubt whatever that the infant was a party to those proceedings by his father and guardian Rajender Singh. We attach no importance to the description of the infant in the title of the suit, namely, "Rajender Singh, father and guardian of Amrit Narayan Sing, minor grandson of Jhamman Singh." This does not indicate, as was suggested and as has been held by the Subordinate Judge, that Rajender Singh was the party to the proceedings and not Amrit Narayan Singh. This is and has been for very many years a common method of description employed in mufassil Courts. In this case there can be no doubt whatever as to who was the actual party to the proceedings. With regard to the absence of any formal order of the Court appointing Rajender Singh guardian, we may say that in this case it appears that from first to last, both in the proceedings before the arbitrators and in the proceedings under section 327, Rajender Singh acted for his minor son and, so far as we can see, acted in his interest. There appears to be no reason why the principle laid down by their Lordships of the Judicial Committee of the Privy Council in *Walian* v. *Banke Behari Pershad Singh* (1), should not be applied to a case of this kind. The mere absence of a formal order appointing a guardian *ad litem* would not necessarily be fatal to the proceedings. The case relied upon by the learned counsel for the plaintiff, *Nogendra Chunder Mittra* v. *Kishen Soonduree Dossee* (2), is clearly distinguishable from the present. In that case the dispute was between the natural father and the adoptive mother of a minor as to the adoption. The description in the plaint was of the father in his own capacity and as guardian of his minor son. Their Lordships pointed out that the minor could not be taken to have been properly represented in that suit inasmuch as neither the plaintiff nor the defendant was competent to represent him, the dispute between them being over his adoption. They, therefore, held that the minor had not

(1) (1903) I. L. R. 30 Calc. 1021 ; L. R. 30 I. A. 182.

(2) (1873) 19 Suth. W. R. 133 ; s. c. *Sreenarain Mitter* v. *Kishen Soonderee Dossee* L. R. I. A. Sup. Vol. 149 ; 11 B. L. R 171.

been a party to those proceedings. In the case before us, the circumstances are very different. The father Rajender Singh was not, and could not be, a party to those proceedings inasmuch as he had no interest in the subject-matter of the dispute. The only possible parties could be Kar Koer and her minor son. That the latter was a party we have no doubt whatever and we think that he must be regarded as having been properly represented in the several Courts. It is true that the question of the representation of the minor did not crop up in any of the three Courts through which those proceedings passed; but this is rather an indication that there was no reason for questioning its propriety. The only question raised on the part of the defendants in those proceedings was that raised by Kar Koer that she had not been a party to the submission. That was found against her, and there the matter ended. There can be no doubt also that the submission to arbitration was for the benefit of the infant. It had the effect of checking the flow of litigation between the two parties. That the award was against him is a matter into which the Court will not enter. That is a matter for the arbitrators: see *Ramji Ram* v. *Salig Ram*(1) above cited. In this view of the case, it appears that the decree of 1865 is binding and in force against the present plaintiff, and that he cannot treat it, as he wishes to treat it in this suit, as absolute nullity. His only course was to bring a suit to set it aside, if he had any good cause for doing so, on the ground of fraud or for any other reason. Such a suit, however, would have to be brought within three years from the date when the fraud became known to the plaintiff. On his own evidence it is clear that he has known of all the facts of this case from his infancy. He says that from the time when he was 12 years old his mother was telling him how his father had colluded with the opposite party and had defrauded her in the matter. The plaintiff attained his majority in 1877. His claim, therefore, to set aside that decree has long since been barred by limitation.

"In this view of the case, it is obvious that the plaintiff's suit must fail, and it appears to us unnecessary to go into the other questions which were raised at the Bar. We may, however, say that in our opinion the plaintiff is not only bound by the decree of the Court but also by the award on which it was based.

"The result is that the appeal must be allowed and the plaintiff's suit dismissed with costs in both the Courts."

On this appeal,

DeGruyther, *K. C.*, and *B. Dube*, for the appellant, contended that the compromise made in the arbitration

(1) (1911) 14 C. L. J. 188, 204.

1917

AMRIT NARAYAN SINGH v. GAYA SINGH.

proceedings was not binding on the appellant who was not a party to it; the award was based on it, and all the judicial proceedings taken under the award were nullities so far as the appellant was concerned. The compromise, moreover, was not for the benefit of the appellant then a minor. Nothing that was done in the arbitration proceedings or under the award and the decree made on it, could have any effect on his right to succeed to the property of his grandfather (who was admittedly separate in estate from his agnates) as soon as that right became effective. The appellant had no interest in the property until his mother died, and therefore no right of suit before that date. The suit was consequently not barred but well within time. Reference was made to article 141 of the 2nd Schedule of the Limitation Act, 1877: article 95 was not applicable. The appellant was not bound by the acts of his mother who had only a life estate. The award was made a decree of Court only against Kar Koer: the appellant's right was not adjudicated upon by the Civil Courts. Rajender Singh had no authority to act as his guardian, as he has not been so appointed under section 3 of Act XL of 1858. Reference was made to *Sham Sundar Lal* v. *Achhan Kunwar* (1), *Walian* v. *Banke Behari Pershad Singh* (2), and *Nogender Chunder Mittra* v. *Kishen Soonduree Dossee* (3).

A. M. Dunne, K. C., for the respondents, contended that the award and the decree made on it were binding on the appellant. His mother represented the whole estate and took proper proceedings to set aside

(1) (1898) I. L. R. 21 All. 71; L. R. 25 I. A. 183.

(2) (1903) I. L. R. 30 Calc. 1021; L. R. 30 I. A. 182.

(3) (1873) 19 Suth. W. R. 133: s. c. *Sreenarain Mitter* v. *Kishen Soondury Dossee* L. R. I. A. Sup. Vol. 149; 11 B. L. R. 171.

the award but they were unsuccessful. The decree was, therefore, it was submitted, binding not only on her, but on the reversioners who succeeded her. Reference was made to *Katama Natchiar* v. *Rajah of Sivagunga* (1). In the arbitration proceedings the dispute was decided by the arbitrators who held that "according to the religion, custom and usage of the parties" the appellant (as the son of a daughter) and his mother had no right to inherit; the widow was entitled only to maintenance. The appellant, it was submitted, was substantially a party to the arbitration proceedings, and the award was consequently binding on him.

The appellant was not called upon to reply.

Nov. 22.

The judgment of their Lordships was delivered by MR. AMEER ALI. This is a suit by a Hindu reversioner to recover possession of certain properties that originally belonged to his maternal grandfather, Jhamman Singh. He alleges that the defendants, respondents before this Board, wrongfully possessed themselves of these properties under colour of certain arbitration proceedings whilst the estate was held by his mother, Kar Koer, as a female owner under the Hindu law. Kar Koer died in 1905, and this action was brought in 1908. The suit is therefore clearly within time The sole question for determination in this appeal is whether the arbitration proceedings and the decree on the award which gave to the predecessors of the respondents possession of these properties, are binding on the appellant.

On Jhamman's death Radha Koer, his widow, applied for the registration of her name in place of her deceased husband in the Collector's records. Her application was opposed by some of Jhamman's agnatic male relations, whom the respondents now represent;

(1) (1863) 9 Moo. I. A. 539, 604.

1917

AMRIT NARAYAN SINGH v. GAYA SINGH.

they claimed the property both under the general Hindu law as also under some undefined family custom. Their objections were overruled by the Revenue Courts, and Radha Koer's name was duly entered in the Collector's register. Radha died shortly after in 1864, and was succeeded in the possession of the estate by her daughter, Kar Koer, the mother of the appellant. The agnates raised a fresh contest as to her right to hold the property. In the disputes that followed, and which were eventually referred to the arbitration of a number of caste-men, she seems to have been represented by her husband, Rajender Singh. There is nothing, however, on the record to show if he had any authority to act for her as her agent. Before the arbitrators had taken any action in the matter, a compromise was arrived at, in which also Rajender purported to act both for her and her infant son, the appellant. Under this compromise, Kar Koer abandoned, in favour of the agnates, all right to the immovable property of her father receiving on her part, besides some moveable property, two small fractional shares in certain lands which stood in her and in her mother's names. The effect of the arrangement was to extinguish completely the reversionary interest of the appellant in his grandfather's estate.

The compromise was placed before the arbitrators and they were invited to make an award in accordance therewith, which they did. It is to be noted that there is nothing on the record to show that the proceedings before the arbitrators ever came to the knowledge of Kar Koer or that she knew of the compromise and its effect. In fact, it appears that Kar Koer did not acquiesce in the award, and the opposite party had to apply to the Civil Court under the provisions of section 327 of Act VIII of 1859 (the law that regulated at the time the procedure of the Civil

Courts in India) for a decree on the award. The Court of first instance held that all the proceedings in connection with the compromise and the award had been without Kar Koer's knowledge. It accordingly dismissed the application of the agnates under section 327.

They appealed to the District Judge, who apparently considered that as Rajender, her husband, was a party to the compromise, her denial could not be believed. He accordingly made a decree "to have the award filed and enforced under section 327." From this decision Kar Koer preferred a "special appeal" to the High Court of Calcutta, which was dismissed. She then applied for a review of judgment, in which she was equally unsuccessful. The result of these decisions was to put her out of possession of the properties covered by the compromise, and which form the subject-matter of the present action. Although the respondents or their predecessors appear to have obtained possession of these properties after the proceedings in the High Court, which terminated in 1865, their names were not registered in the Collectorate in substitution of Radha Koer until 1877.

It is to be noticed that neither in the judgment of the District Judge nor in that of the High Court is there any reference to the right of Kar Koer's infant son or to the effect of the compromise which culminated in the award on his reversionary interest. Had the question been presented in any shape to the Courts that were dealing with the matter, it is hardly likely their judgments would not have contained some expression as to whether the compromise and the award based thereon were or were not for the benefit of the reversioner.

In this action the plaintiff charged that the arbitration proceedings, together with the compromise and

1917

AMRIT NARAYAN SINGH v. GAYA SINGH.

award, were fraudulent and taken and entered into without the knowledge or authority of Kar Koer; that in any event he was not bound by them. The defendants, on the other hand, among other pleas, urge that the award and decree precluded the plaintiff from maintaining the action. The Subordinate Judge of Patna, before whom the suit came for trial in the first instance, framed a number of issues on the several allegations of the parties, most of which have become immaterial in view of the shape the case took on appeal to the High Court. The Trial Judge, in a well-reasoned and exhaustive judgment, held in substance that Jhamman at the time of his death was separated from his agnates; that the defendants had failed to prove the custom they alleged relating to the exclusion of widows and daughters; and that the plaintiff was not properly represented in the arbitration proceedings or in the proceedings before the Civil Courts, and was not bound by the award or the decree based thereon. He accordingly decreed the plaintiff's claim.

From this decree the defendants appealed to the High Court of Calcutta, where the case proceeded on the assumption that Jhamman was separate from his agnates, and that assumption has not been challenged before this Board. The contest in the High Court turns solely on the binding effect of the award and the decree enforcing it on the rights of the infant reversioner.

The learned Judges state thus the questions they had to determine, viz:—

"(*i*) Whether Rajender Singh had power to refer the matter on behalf of his minor son to arbitration; (*ii*) whether the plaintiff was properly represented in the proceedings in the Civil Court under section 327 of Act VIII of 1859; and (*iii*) and if he was, whether he can now treat the decree, which was based on the award, as a nullity, and claim possession of these properties at this distance of time."

After answering the first two questions in the affirmative, the learned Judges decided the third against the plaintiff, and reversing the decree of the Subordinate Judge, dismissed the plaintiff's suit.

Their Lordships are unable to concur in the propositions on which the learned Judges of the High Court have based their judgment. With respect, in proceeding to consider whether Rajender Singh, the plaintiff's father, had power to refer the matter on behalf of his minor son to arbitration, they seem to have misconceived the legal position of the infant under the Hindu law. Evidently they thought he had a right which could form the subject of bargain. This is an obvious mistake; a Hindu reversioner has no right or interest *in præsenti* in the property which the female owner holds for her life. Until it vests in him on her death, should he survive her, he has nothing to assign or to relinquish, or even to transmit to his heirs. His right becomes concrete only on her demise; until then it is mere *spes successionis*. His guardian, if he happens to be a minor, cannot bargain with it on his behalf or bind him by any contractual engagement in respect thereto. Rajender's action, therefore, in referring to arbitration any matter connected with his son's reversionary interest was null and void.

The learned Judges seem also to have lost sight of the fact that the award actually made was based on the compromise; it gave effect to the agreement at which the parties had arrived. Even had the minor an existing right, the father would have no power to enter into an arrangement which wiped out all his interest without any consideration, for the little property that was left to Kar Koer was taken by her under the compromise, and not by virtue of her right to her father's estate. It is difficult to see how the

1917

AMRIT NARAYAN SINGH v. GAYA SINGH.

learned Judges came to the conclusion that the compromise was to the benefit of the minor.

Apart from the question whether Rajender could represent his son under the proceedings under section 327 of Act VIII of 1859 without a certificate under section 3 of Act XL of 1858 on which their Lordships desire to express no opinion, it is abundantly clear that the Civil Courts did not purport in any shape or character to deal with or adjudicate upon the reversionary right of the infant. The decree enforcing the award was based on the finding that Kar Koer had acquiesced by her husband in the reference to arbitration, and that she had similarly consented to the compromise, and was therefore bound by the award. Beyond that the order of the District Judge, which was affirmed by the High Court, did not go; it affected her interest, and her interest only.

It may be noted here that on the appeal to the High Court the minor was not a party.

In the present appeal it has been attempted on behalf of the respondents to sustain the decree of the High Court on the basis of the *dictum* of the Judicial Committee in the well-known *Shivagunga Case* (1) where, dealing with the question under what circumstances a decree against the widow may bind the reversioners, the Board expressed itself thus:—

"That unless it could be shown that there had not been a fair trial of the right in that suit, or, in other words, unless that decree could have been successfully impeached on some special ground, it would have been an effectual bar to any new suit by any person claiming in succession to Angamootoo. For assuming her to be entitled to the zemindari at all, the whole estate would for the time be vested in her, absolutely for some purposes, though in some respects for a qualified interest; and until her death it could not be ascertained who would be entitled to succeed. The same principle which has prevailed in the Courts of this country as to tenants in tail representing the inheritance would seem to apply to a

(1) (1863) 9 Moo. I. A 539.

Hindu widow; and it is obvious that there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow."

In the present case their Lordships think it enough to say that the proceedings culminating in the decree by which the plaintiff is sought to be bound are entirely devoid of the conditions on which and which alone a reversioner can be shut out from the assertion of his right, which comes to him altogether independently of the female owner.

Their Lordships are of opinion that the judgment and decree of the High Court should be reversed and the decree of the Subordinate Judge restored. And they will humbly advise His Majesty accordingly. The appellant will have his costs in the High Court and in this appeal.

J. V. W. *Appeal allowed.*

Solicitors for the appellant: *Watkins & Hunter.*

Solicitors for the respondents: *Barrow, Rogers & Nevill.*

APPEAL FROM ORIGINAL CIVIL.

Before Sanderson C. J. and Woodroffe J.

1917

May 22.

GAMMETER

v.

THE CONTROLLER OF PATENTS AND DESIGNS.*

Design—Wrist-watch band—Registration—Application by outside party to expunge—Cancellation of registration by Controller—Jurisdiction of Controller—New and original design—Shape and configuration—Ornamentation and utility—Analogous designs—Different purposes and dissimilar use—Motion to the High Court by registered proprietor—Other specific and adequate legal remedy available—Specific Relief Act (I of 1877), s. 45—Patents and Designs Act (II of 1911), ss. 62, 64, 67.

G registered a design for a wrist-watch band, which he called the "Novelty" band. Subsequently Messrs. B. & Co. copied the design and on threat of legal proceedings by G, applied to the Controller of Patents and Designs under s. 62 of the Patents and Designs Act for an order to remove the design from the register. This the Controller did after having issued notice on G and having heard both parties. G then in an application, entitled "In the matter of section 45 of the Specific Relief Act and in the matter of the Indian Patents and Designs Act, 1911," moved the High Court for an order that the Controller had no jurisdiction to remove the registration of the design and that he should be required to restore the design to the register on the ground that the design was new and original. The Court dealt with the matter under s. 64 of the Indian Patents and Designs Act and discharged the Rule, Messrs. B & Co. contending that the design in question had been anticipated by a bracelet produced by Messrs. C. & K. On appeal by the petitioner :—

Held, that the Controller had no jurisdiction to cancel the registration and under the Act the proper and ordinary way of expunging the registration of a design was to apply to this Court under s. 64 of the Patents and Designs Act.

Held, also, that section 62 of the Patents and Designs Act was limited to applications by the registered proprietor, or by some person

* Appeal from Original Civil, No. 103 of 1916.

in whom his interest was vested, and the action of the Controller was not justified by that section.

Held, also, that the Court had no power to revise the Controller's decision under s 64.

Held, also, that this application, which was made under section 45 of the Specific Relief Act, was not barred by section 64 of the Patents and Designs Act.

Held, also, that the application of the shape of the "Novelty" band to a watch to be worn on the wrist was for a purpose so different from and for a use so dissimilar to the purpose of the bracelet, that the design in question might be said to be original.

Per SANDERSON C. J. The shape and configuration of the metal band taken by itself cannot be said to be new or original.

Per WOODROFFE J. A wrist band used to carry an ornament such as that produced by Messrs. Cooke and Kelvey and a wrist band to carry a watch do not appear to me to be so analogous as to deprive the applicant of his claim to novelty. Further, the band is original and differs from the other band produced, by its circular shape, according to which it passes at the back of the watch, and as a consequence of that produces a flattening.

APPEAL by Ernest Otto Gammeter, the petitioner.

On the 16th January, 1915, Ernest Otto Gammeter, who was the proprietor of the Anglo-Swiss Watch Co., carrying on business in Calcutta, applied under the Indian Patents and Designs Act, 1911, to the Controller of Patents and Designs to register the design of a metal band for attaching a watch to the wrist. The description of the design was as follow:—

"The design consists of a metal band for attaching a watch to the wrist and novelty is claimed for such a band, preferably of silver, passed below the watch through loops affixed to each side of the watch case, which method by preventing the bending of the band between the said loops, tends to draw the free ends of the band apart and thus assisted by the resilience of the metal, prevent the accidental opening of the fastening means which consist of one or more studs on one end and projecting from either the inner or outer side of the bands, taking into one or more several key-hole slots provided in the other end of the band".

On the 5th February, 1915, the abovementioned design was duly registered in Class one, and numbered

1917

GAMMETER v. THE CONTROLLER OF PATENTS AND DESIGNS.

Design No. 2611, and a certificate of registration was granted by the Controller to Ernest Otto Gammeter as proprietor thereof. This design was called the "Novelty" Band. Shortly after the introduction of the "Novelty" Band, Messrs. Boseck & Co., a firm of watchmakers and jewellers in Calcutta, copied the design. In consequence of this infringement they were threatened with criminal proceedings and on the 23rd July, 1915, they made an application to the Controller of Patents and Designs to cancel the registration of the design in question, under section 62(*b*) of the Indian Patents and Designs Act on the ground that the said design was not new and original. Notice was issued by the Controller on Ernest Otto Gammeter and the 4th August, 1915, was fixed for hearing the application. On the 7th August, 1915, the Controller after having heard both parties, passed an order cancelling the registration wholly. On the 25th January, 1916, Ernest Otto Gammeter wrote to the Controller asking him to reconsider his order and to replace his design upon the register, but the request was refused. On the 22nd February, 1916, notice on behalf of Ernest Otto Gammeter was issued on the Controller, stating that an application would be made to the High Court for an order that the Controller of Patents and Designs do place the Design No. 2611 upon the register of designs in such manner as the same was on and prior to the 4th August, 1915, and on the 9th May, 1916, a copy of the above notice was issued on Messrs. Boseck & Co. The application to the High Court was entitled "In the matter of section 45 of the Specific Relief Act and in the matter of the Indian Patents and Designs Act, 1911, and in the matter of Ernest Otto Gammeter." The Controller only appeared and on the 17th May, 1916, Mr. Justice Fletcher decided that the Controller had jurisdiction to remove the design from the register

and adjourned the hearing of the further question, as to whether the Court would direct the Controller to restore the registration. The Court ordered that notice of this application should be served on Messrs. Boseck and Co., who should also be notified as to what affidavits the applicant intended to use at the adjourned hearing of the application. As regards the Controller, the Court left it optional to him to appear or not on the further application, holding that he was entitled to appear under the terms of the Act and to be represented by counsel. On the 13th July, 1916, the application came on again for hearing and Mr. Justice Fletcher decided the question against the applicant on the ground that the design in question was not new and original, inasmuch as it had been anticipated by a bracelet produced by Messrs. Cooke and Kelvey and held in stock by them for about 5 years prior to the date of the registration of the applicant's design, and discharged the Rule. The applicant, thereupon, appealed.

The Offg. Advocate-General (*Mr. B. C. Mitter*) (with him *Mr. S. C. Roy*), for the Controller, asked to be dismissed from the appeal.

Mr. Langford James (with him *Mr. S. K. Gupta*), for the appellant, submitted that the Controller should not be dismissed from the appeal as the appellant was questioning the authority of that officer to expunge Design No. 2611 of 1915, from the register. There were two questions in issue in this appeal, *first*, had the Controller jurisdiction to cancel the registration of the said design at the instance of a party other than the registered proprietor; and, *secondly*, if the Controller had such jurisdiction, should the design have been expunged from the register, inasmuch as it was a new and original design.

1917

GAMMETER v. THE CONTROLLER OF PATENTS AND DESIGNS.

The Advocate-General took the objection that the appellant's remedy under s. 45 of the Specific Relief Act was barred by his proceeding under s. 64 of the Patents and Designs Act. He had two remedies open to him, one under s. 45 of the Specific Relief Act, and the other under s. 64 of the Patents and Designs Act. This application was originally under s. 45, as was clearly indicated by the title of the application. As a matter of fact, in the Court of first instance he proceeded under s. 64 and Mr. Justice Fletcher decided the matter under that section and held that the Controller had jurisdiction. If the appellant wished to proceed under s. 45 he ought to have corrected the record, but instead, having lost the case under s. 64, he now desired to proceed under s. 45. This it was not permissible for him to do. Having acquiesced in the order of Mr. Justice Fletcher to proceed under s. 64, he should not be allowed to proceed now under s. 45. Under s. 64 the Government was not interested and the question of jurisdiction was useless, but the position was otherwise under s. 45, both the procedure and the rules being different thereunder.

Mr. Langford James submitted that the Controller had no jurisdiction to deal with the present case under s. 62 of the Patents and Designs Act, for if it be held that he had jurisdiction, the registered owner would be deprived of his remedies for revision and correction. That section did not apply to an outside party, but only to the registered proprietor for the purpose of correction of clerical errors. Under that section no notice was necessary; therefore, the issuing of notice in the present case under that section was *ultra vires*. The discretionary powers exerciseable by the Controller under s. 67 were with reference to ss. 5, 17 and 43 and the registered proprietor had the right of appeal from orders passed by the

Controller in the exercise of his discretionary powers. There was, however, nothing in s. 67 which extended the discretionary powers thereunder to s. 62, which was unappealable. As regards the appellant's remedy under s. 64, the Court had power to rectify the register under s. 64 in the case of "non-insertion in or omission from the register." These words were not applicable to the case of an entry which had been admitted in the register and then cancelled from it, as in the present instance. It would, therefore, be absurd to say that under the discretionary powers granted under s. 67 the Controller had jurisdiction to deal with this case under s. 62, and that an appeal would lie to the High Court under s. 64. Messrs. Boseck & Co. should have made their application direct to the High Court under s. 64, which provided for cases like the present one, and not to the Controller under s. 62. *In re Clarke's Design* (1) was referred to. Reference was also made to the corresponding sections of the English Act and to the rules and forms thereunder.

The Advocate-General contended that there was nothing in s. 62 of the Patents and Designs Act to limit that section to the registered proprietor. Under section 65 the Controller was vested with the powers of a Civil Court. He could, therefore, issue notice on parties. Under s. 67 there was a general provision for the exercise of discretionary powers by the Controller. There was nothing in s. 67 which showed that the Controller had not the power to give notice to the registered owner when dealing with a case under s. 62. Therefore, having regard to ss. 65 and 67 and the general scope of the Act, the Controller under s. 62 had power to give notice to the registered proprietor and to deal with the present case. The introduction

(1) [1896] 2 Ch. 38.

1917

GAMMETER v. THE CONTROLLER OF PATENTS AND DESIGNS.

of words not to be found in the sections of the Act should not be introduced to construe the sections. And, furthermore, the Indian Act should be construed independently of the rules of construction under the English law. This application could undoubtedly have been made under s. 64. There were, however, many cases where parties would not like to come to the Court for remedy. They could in such cases go to the Controller under s. 62. Where an order was passed against the appellant under s. 62, he could apply under s. 64 to the High Court for such order to be revised and corrected. The appellant could not succeed under s. 45 of the Specific Relief Act, unless he showed that s. 64 of the Patents and Designs Act was inapplicable. This latter section provided a "specific and adequate legal remedy" and it was only in the absence of such a remedy that s. 45 was applicable. This was, therefore, not a matter under s. 45: see *Kesho Prasad Singh* v. *The Board of Revenue* (1). Not only had the appellant specific and adequate legal remedy under s. 64, but he had, as a matter of fact, proceeded under that section in the Court of first instance.

Mr. Langford James submitted that it was never conceded by the appellant that his application to the Court was under s. 64 of the Patents and Designs Act, and proceeded to deal with the merits of the case. It was sufficient if the design was new *or* original, and it was not necessary that it should be new *and* original: see *Dover, Limited* v. *Nurnberger Celluloidwaren Fabrik Gebruder Wolff* (2). The appellant's article could not be registered as jewellery, as could be done with the bracelet which was produced and which it was contended was an anticipation of the appellant's

(1) (1911) I. L. R. 38 Calc. 553. (2) [1910] 2 Ch. 25.

design. The purpose of the bracelet was ornamentation of the wrist watch band utility. The bracelet and the band were registered in different classes and both were patentable: see *Walker, Hunter & Co.* v. *Falkirk Iron Company* (1) and *In re Clarke's Design* (2). A large and immediate sale, an attempt to pirate the patent and the cataloguing of the picture of the design by the defendant company were three tests to prove the novelty and originality of the patent: see *Tyler & Sons* v. *Sharpe Brothers & Co.* (3), *Nevill* v. *John Bennett & Sons* (4), *Harper & Co., Ld.* v. *The Wright & Butler Lamp Manufacturing Company Ld.* (5), *Heinrichs* v. *Bastendorff* (6). As regards novelty, there was no analogy between the bracelet and the wrist-watch band, though with very little ingenuity the bracelet might be converted into a wrist-watch band. The bracelet would have to be registered for pattern, ornamentation being the essence of it, and would be classed in Class 2; whereas the wrist-watch band would have to be registered for shape, utility being the essence of it, and classified under Class 1. One was jewellery, the other was a band: see *In the matter of Frederick Pearson's Registered Designs* (7). On the question of design, by whatever principle the test might be applied to the appellant's article, it would be found to be a new and original design: see *In the matter of Rollason's Registered Design* (8).

Mr. B. L. Mitter (with him *Mr. S. R. Das*), for Messrs. Boseck & Co. The claim in this case was as to the design, shape and configuration of the metal band and not to the band itself. That would be the subject

(1) (1887) 4 Pat. Cas 390.
(2) [1896] 2 Ch. 38.
(3) (1893) 11 Pat. Cas. 35.
(4) (1898) 15 Pat. Cas. 412.
(5) (1895) 12 Pat. Cas. 483.
(6) (1893) 10 Pat. Cas. 160.
(7) (1906) 23 Pat. Cas. 738.
(8) [1898] 1 Ch. 237; 15 Pat. Cas. 441.

1917

GAMMETER v. THE CONTROLLER OF PATENTS AND DESIGNS.

matter for copyright and not for patent. In support of this contention, see *Walker, Hunter & Co.* v. *Falkirk Iron Company* (1). A design was protected by copyright and an article by patent. See also *In re Clarke's Design* (2). What was registrable was the shape, irrespective of the attachment, jewel or watch and there was nothing peculiar in the appellant's article. The shape was an old shape and the application of that shape to a new article was not registrable: see *In re Clarke's Design* (2) and *Pugh* v. *Riley Cycle Company* (3). In determining novelty of design, utility was absolutely immaterial: see *Hecla Foundry Company* v. *Walker Hunter & Co.* (4) and *In re Clarke's Design* (2). The application of the design must not be to an analogous or kindred object. Under the Act it was not necessary that two objects to be analogous or kindred should fall under the same Class. The shape of the appellant's band was a common shape for all metal bands for the wrist. A bracelet which carried jewels on the wrist was analogous or kindred to a bracelet which carried a watch on the wrist, the essential feature in both being the carrying of an article on the wrist. In support of the above propositions, see *In re Read & Greswell's Designs* (5), *In re Clarke's Design* (2), *Dover, Limited.* v. *Nurnberger Celluloidwaren Fabrik Gebruder Wolff* (6), *Pugh* v. *Riley Cycle Company* (3), *Walker Hunter & Co.* v. *Falkirk Iron Company* (1) and Halsbury's Laws of England, Vol. 27, p. 730, note (p).

Mr. Langford James, in reply, referred to Halsbury's Laws of England, Vol. 27, p. 729, *Gramophone Company, Ld.*, v. *Magazine Holder Company* (7),

(1) (1887) 4 Pat. Cas. 390.
(2) [1896] 2 Ch. 38.
(3) [1912] 1 Ch. 613.
(4) (1883) 14 App. Cas. 550.
(5) (1889) 42 Ch. D. 260.
(6) [1910] 2 Ch. 25; 27 Pat. Cas. 498.
(7) (1911) 28 Pat. Cas. 221.

Heath & Sons, Limited, v. *Rollason* (1), *Tyler & Sons* v. *Sharpe Brothers & Co.* (2) and *In re Read & Greswell's Designs* (3) which last case was relied on by the respondent Company. The shape in question was not a wellknown shape and the doctrine of analogy was not applicable. If the ornament on the bracelet were removed, it would leave the band a totally different design which would have to be altered to resemble the design of the wrist-watch band. This fact would be fatal to the case. Moreover, a thing saleable in one class and unsaleable in another would go to prove strongly that there was no analogy between the two articles in question. The Court in dealing with this case would have to take the utility of the article into consideration especially in arriving at a decision on the analogy between the two articles: see Halsbury's Laws of England, Vol. 27, p. 732, on the question of utility.

Cur. adv. vult.

SANDERSON C. J. This is an appeal by Ernest Otto Gammeter against the judgment of my learned brother Mr. Justice Fletcher.

The matter arises in connection with an application which was made by Mr. Gammeter to the Controller of Patents and Designs on the 16th of January, 1915, whereby the Controller was requested to register the accompanying design in class. The description of the design was as follows: "The design consists of a metal band for attaching a watch to the wrist and novelty is claimed for such a band, preferably of silver, passed below the watch through loops affixed to each side of the watch case, which method by preventing the bending of the band between the said loops, tends to draw the free ends of the band apart,

(1) [1898] A. C. 499.
(2) (1893) 11 Pat. Cas. 35.
(3) (1889) 42 Ch. D. 260.

1917

GAMMETER v. THE CONTROLLER OF PATENTS AND DESIGNS.

SANDERSON C. J.

and thus assisted by the resilience of the metal, prevent the accidental opening of the fastening means which consist of one or more studs on one end and projecting from either the inner or outer side of the band, taking into one or more of several key-hole slots provided in the other end of band."

The Controller registered that design on the 5th of February, 1915. On the 23rd of July, 1915, Messrs J. Boseck & Co. applied to the Controller for cancellation of the registration; and, after hearing both parties, that is to say, Mr. Gammeter and Messrs. Boseck & Co., on the 7th of August, 1915, the Controller cancelled the registration. On the 23rd of February, 1916, notice of an application to the learned Judge was given; and, the notice was that an application would be made for an order that the Controller of Patents and Designs should place the design No. 2611 upon the Register of Designs in such manner as the same was on and prior to 4th August, 1915. The notice was headed "In the matter of section 45 of the Specific Relief Act, 1877, and, in the matter of the Indian Patents and Designs Act, 1911." Section 45 of the Specific Relief Act provides as follows: "Any of the High Courts of Judicature at Fort William, Madras and Bombay, may make an order requiring any specific act to be done or forborne, within the local limits of its Ordinary Original Civil Jurisdiction, by any person holding a public office, whether of a permanent or a temporary nature, or by any Corporation or inferior Court of Judicature, Provided" . . . "(*c*) that in the opinion of the High Court such doing or forbearing is consonant to right and justice," "(*d*) that the applicant has no other specific and adequate legal remedy."

The first point that was taken before the learned Judge was that the Controller had exceeded his

jurisdiction: and, the second point was that, even if he had jurisdiction, he ought not to have cancelled the registration, because the design was in fact a new and original design.

Now, the Controller is alleged to have acted under section 62 of the Indian Patents and Designs Act: and, it is argued on behalf of the appellant that the Controller had no jurisdiction upon the application of Messrs. Boseck & Co., which was hostile to the interest of Mr. Gammeter, to cancel the registration of the design, on the ground that section 62 is limited to cases of applications by the registered owner or somebody in whom is vested the interest of the registered owner, such as the Trustees in Brankruptcy or the liquidator, if the registered owner happens to be a Company. That is the first question I propose to consider.

The first part of this Act deals with Patents, and the second part, which begins at section 43, deals with Designs; and, section 43 provides, in sub-section (*1*) that, "The Controller may, on the application of any person claiming to be the proprietor of any new or original design not previously published in British India, register the design under this part." Sub-section (*4*) provides that "The Controller may, if he thinks fit, refuse to register any design presented to him for registration; but any person aggrieved by any such refusal may appeal to the Governor-General in Council": so that, the Controller upon an application for the registration of a design has discretion either to register or to refuse to register, but his decision is subject to an appeal not to the Courts, but to the Governor-General in Council. Then after several sections to which I need not refer in detail, comes section 62 in Part III, which part applies generally both to Patents and Designs. That section provides, "The

1917

GAMMETER v. THE CONTROLLER OF PATENTS AND DESIGNS.

SANDERSON C. J.

Controller may, *on request in writing* accompanied by the prescribed fee,—(*a*) correct any clerical error in or in connection with an application for a patent or in any patent or any specification; (*b*) cancel the registration of a design either wholly or in respect of any particular goods in connection with which the design is registered; (*c*) correct any clerical error in the representation of a design or in the name or address of the proprietor of any patent or design, or in any other matter which is entered upon the register of patents or the register of designs." That is the section upon which this matter primarily depends. I am of opinion that the contention of the appellant in this case with regard to the construction of that section is correct. I think, on reading the section itself, the proper construction to put upon it is that it is limited to applications by the registered proprietor or by some person in whom his interest is vested. First of all, the words "on request in writing" induce me to think that they must mean on request, by a person who is interested in the patent or design. Then when I come to look at the matters which are dealt with in that section, I find that clause (*a*) deals with the correction of any clerical error in or in connection with an application for a patent or in any patent or any specification; and clause (*c*) deals with the correction of any clerical error in the representation of a design, etc. These are obviously matters which can concern only the proprietor, or the person in whom his interest is vested. Then between these two clauses (*a*) and (*c*), comes the clause in question, "(*b*) cancel the registration of a design either wholly or in respect of any particular goods in connection with which the design is registered." It is quite possible that the registered owner may desire to have the registration cancelled, for

1917

GAMMETER v. THE CONTROLLER OF PATENTS AND DESIGNS.

SANDERSON C. J.

instance, he may desire to avoid a litigation which may be threatened against him in connection with the design which he has been successful in getting registered. I think it is an extraordinary way of providing, if it was intended to provide, that the Controller might cancel the registration upon an application by a third person hostile to the registered owner, by placing the provision between two clauses which obviously deal with the correction of clerical errors which obviously can only be corrected on the application of a registered owner. The matter does not rest there: because when I come to section 64, sub-section (*1*), I find it provides, "A High Court may, on the application in the prescribed manner of any person aggrieved by the non-insertion in or omission from the register of patents or designs of any entry, or by any entry made in either such register without sufficient cause, or by any entry wrongly remaining on either such register, or by an error or defect in any entry in either such register, make such order for making, expunging or varying such entry as it may think fit." I think the learned Judge in the Court below held that the words "non-insertion in or omission from the register" would cover a case of the registration of the design and subsequent cancellation of it. I doubt, having regard to the provision of section 62, whether that is the correct interpretation to put upon it. When the word "cancel" has been used in section 62, if the Legislature intended that section 64 should apply to cancellation by the Controller, I think it is a curious thing that that has not been specifically mentioned in section 64. The word "cancel" has been used in clause (*b*) of section 62; and if that was intended to be "cancellation" upon the application of a person hostile to the registered owner, and if it was intended by section 64 to give a right of

1917

GAMMETER v. THE CONTROLLER OF PATENTS AND DESIGNS.

SANDERSON C. J.

appeal against such cancellation, I think it is extraordinary that the word "cancellation" was not used in section 64. But again the matter does not rest there because when I turn to section 67, I find that section provides as follows:—"Where any discretionary power is by or under this Act given to the Controller, he shall not exercise that power adversely to the applicant for a patent, or for amendment of an application or of a specification, or for registration of a design, without (if so required within the prescribed time by the applicant) giving the applicant an opportunity of being heard." I think it is pretty plain that the sections which are referred to in that section are sections 5, 17 and 43, and that section 62 is not referred to. It provides that if the Controller is going to exercise his power adversely to the applicant in any of the cases mentioned, he should give the applicant an opportunity of being heard. The section does not deal with the application which it is suggested may be made by a third person under section 62 for cancellation of the registration. The learned Advocate-General argued that, inasmuch as the Controller would be occupying a *quasi* judicial position, he would naturally give the applicant an opportunity of being heard. The point, however, is that when the Act specifies certain cases in which an opportunity of being heard should be given to the applicant, it seems to me that if paragraph (*b*) of section 62 had been intended to apply to the cancellation of registration upon the application of a person other than the registered owner, then section 67 would have contained a provision that in such a case an opportunity of being heard should be given to the owner of the registered design. These considerations lead me to think that the contention put forward by the appellant in this case is a

correct one. Then again, this section is similar to section 70 of the English Act, (7 Edw. 7), and our attention was drawn to the form which had been drawn up by the Board of Trade in pursuance of the English Act: that section has been interpreted by the Board of Trade as applying only to applications by a registered owner or by somebody in whom the interest of the registered owner is vested, such as the Trustee in Bankruptcy or, in the case of a Company, the liquidator. I quite agree with the learned Advocate-General that that interpretation is not binding upon this Court: but it is interesting, at all events, to find that the Board of Trade interpreted the Act in the same way that I have. It is argued by the learned Advocate-General that as regards this country, Form No. 20 is not limited to applications by registered owners. That is quite true. But the section which gives power to the Governor-General in Council to make rules under the Act, is section 77, and it is in these words: "(*1*) The Governor-General in Council may make such rules as he thinks expedient, subject to the provisions of this Act . . . . . (*g*) generally for the purpose of carrying into effect the provisions of this Act." It must be obvious that that section does not give the Governor-General in Council power to extend the powers of the Controller further than is given to him by the express provisions of the Act, and I do not think that the fact that Form No. 20 has been framed in a general way and is not limited in its words to applications by a registered owner, affects what I think is the meaning of section 62.

Therefore, the conclusion at which I arrive on this point is that the Controller upon the application of Messrs. Boseck & Co. had no jurisdiction to cancel the registration and it seems to me that under the Act the proper and ordinary way of expunging the

1917

GAMMETER v. THE CONTROLLER OF PATENTS AND DESIGNS.

SANDERSON C. J.

registration of a design was to apply to this Court under section 64.

This, however, does not conclude the question, because the learned Judge in deciding the first point in favour of the Controller adjourned the matter in order that he might see whether or not the design was a new or original design. The learned Judge thought that the Court had power to revise the Controller's decision under section 64. If my interpretation of section 62 is correct then that would not be so, and the applicant would be entitled to the order which he asks for, under section 45 of the Specific Relief Act but for the existence of paragraph (*c*) to which I have already referred, namely, "that in the opinion of the High Court such doing or forbearing is consonant to right and justice."

Therefore, before we can direct the Controller to restore the registration of the design, we have to consider in effect the same question which was considered by the learned Judge, Mr. Justice Fletcher, namely, whether the Court should require the Controller to restore the design to the register on the ground that the design was new and original.

Now, the findings of the learned Judge on this part of the case are as follows: First of all, he points out that "the judgment of the Controller turned on the question as to whether there was any novelty in the key-holes and buttons which are used for fastening the band to the wrist." The applicant seems to have been rather doubtful as to the ground on which he ought to have based his case, and the point that was urged before the Controller has not been urged before us. Obviously it could not be, because there was no novelty or originality in the *fastening* of this particular band. That is clear upon the evidence. But it is not unimportant to notice. Apparently this

was the main point which the Controller had before him when Messrs. Boseck & Co. were objecting to the registration; and, if that was the main ground relied upon for novelty and originality, I can quite understand that the Controller came to the conclusion that there was no novelty or originality. When this matter was before the learned Judge, one of the grounds on which the appellant relied was that there was *flattening* of the band. The learned Judge based his decision, to some extent at all events, upon the fact that he was convinced that there was nothing in that point, and that the *flattening* did not really exist and that it only came into existence when the band was fitted on to the watch, and that by reason of the manner in which it was fitted to the watch a certain amount of *flattening* must take place. He did not base his judgment upon that ground alone, but he came to the conclusion that having regard to the shape and configuration of the bracelet which was produced before him in Court there was nothing new or original in the design which was relied upon. Before considering that point which is the real point at all events as regards the merits of this case, I think I ought to point out that the learned Judge came to certain definite findings: *first*, he held with regard to this band which I may, for the sake of convenience call the "Novelty" band, that prior to its introduction the evidence establishes that a plain metal band of uniform width in one piece passing through the loops of the watch had not been used in connection with wrist watches; *secondly*, that shortly after the "Novelty" band had been introduced, Messrs. Boseck & Co. copied it; *thirdly*, that on a threat of legal proceedings they applied to the Controller to remove the design from the register, which the Controller after hearing the parties did; *fourthly*, that the evidence also shows

1917

GAMMETER v. THE CONTROLLER OF PATENTS AND DESIGNS.

SANDERSON C. J.

that when the "Novelty" band was introduced, it had a large and immediate sale; and, *fifthly*, that there was produced before him, as there had been before the Controller, a bracelet which, it was said, was an anticipation of the petitioner's design. Then he describes the bracelet as follows: "The bracelet consists of a plain metal band of gold of uniform width fastened in exactly the same method as the "Novelty" band. In this metal band are two (it ought to be three) small holes pierced so as to allow a pearl ornament to be affixed thereto by screws. The object, of course, is for this to be used as an ornament. This bracelet is one of a pair manufactured by Messrs. Cooke & Kelvey of this city, and which they have had in stock for about 5 years prior to August, 1915. There is other evidence of the manufacture and sale of other similar bands, but I am not satisfied that the evidence on that point is reliable." Then he goes on to say: "The case must, therefore, stand or fall on the bracelet produced by Messrs. Cooke & Kelvey" (that is, this bracelet which I have now in my hand). "It has been decided in a series of cases that the test of novelty is the eye of the Judge. He must place the two designs side by side and see whether the one for which novelty is claimed is new." I entirely agree with the principle which is laid down by the learned Judge. The matter, of course, to a very large extent, is a matter of first impression, inasmuch as it depends upon the view a Judge looking at the article in question takes, when comparing it with the other article which is said to be an anticipation.

In my judgment, the shape and configuration of the metal band taken by itself cannot be said to be new or original. I have the "Novelty" band before me and the bracelet which was produced by Messrs. Cooke and Kelvey. It is true that it is not of the same size,

that is to say, it is narrower than the bracelet, and not of the same dimensions; but as regards the shape and the configuration, I confess I cannot see anything new or original. It is conceded that the fastenings are similar and that the method of the fastening has been known in the trade for a considerable time. But that does not conclude the matter. The real point in this case, in my judgment, arises in connection with the user of this metal band: and, I have to ask myself the question whether the application of the "Novelty" band was in respect of an object analogous or kindred to the bracelet: or, to put it in another way, was the metal band intended for such a different purpose and for a use so dissimilar that the design may be held to be new or original. I think the case *In re Clarke's Design* (1) lays down quite clearly what the test in matters of this kind is. In the judgment of Lord Justice Lindley, at page 45, he dealt with the case which had been decided by Mr. Justice Chitty [*In re Read & Greswell's Design* (2)] and then with reference to that he said as follows: "In this last case, Chitty J. said that 'to be capable of being registered a design must be *new or original* in fact and not, as is suggested, *new or original* as to some particular class of goods. It cannot be said to be new and original if it is already being applied to articles of an analogous character' (that is a quotation from Mr. Justice Chitty's judgment). The learned Judge was obviously referring to the classes of goods mentioned in the schedule to the Designs Rules, and the words referring to articles of an analogous nature shew that the learned Judge did not intend by the words 'new or original in fact' to decide that a design must be new or original in the sense of never having been seen before as applied to any article whatever. In *Walker, Hunter*

(1) [1896] 2 Ch. 38. (2) (1889) 42 Ch. D. 260.

1917

GAMMETER v. THE CONTROLLER OF PATENTS AND DESIGNS.

SANDERSON C. J.

& Co. v. *Falkirk Iron Co.* (1) and *Hecla Foundry Co.* v. *Walker, Hunter & Co.* (2) a design for the shape of an iron furnace-door was protected, although wooden doors of the same shape for sideboards and other articles of furniture were old. The things shaped were for such different purposes and their uses were so dissimilar that the design for one of such things was held to be new or original, although it was old for the other. What then is the test to be applied to a case such as that before us? The design must be new or original with reference to the kind of article for which it is registered, meaning by kind of article, not the class of article mentioned in the schedule to the rules, but the kind of article having regard to its general character and use". Then he proceeds to give well known instances: "A design may be new for a coal-scuttle, but not for a bonnet." Now, that being the test, I formulate the question which I have to put to myself, having regard to its general character and use, was the "Novelty" band for a purpose so different from, and for a use so dissimilar to, the purpose and use of the bracelet that the design may be said to be new and original. To my mind the purpose and use of the band are entirely different from the purpose and use of the bracelet. The "Novelty" band is intended to attach a watch to the wrist. The object of wearing a watch on the wrist is generally different from that of wearing a bracelet,—one is for a useful purpose and the other is ornamental. It was pointed out in argument, and I think based upon evidence, that the leather straps which had been generally used for the purpose of attaching a watch to the wrist, were unsuitable to such a country as this, or in fact, to any other country of hot climate, and consequently this band—the "Novelty" band—

(1) (1887) 4 Pat. Cas. 390. (2) (1889) 14 App. Cas. 550.

which was introduced had become a very useful article, and, as appears from the evidence, had, to use the words of the learned Judge, "a large and immediate sale." There may be a few cases where the articles (the watches) are so ornamental that they are worn more as ornaments than as articles of use ; but I think they are the exceptions and not the rule: and in my judgment this "Novelty" band which was made an exhibit in the case is not the kind of band which would be ordinarily used for an ornamental watch.

It is said by the learned counsel for Messrs. Boseck and Company that utility is wholly immaterial. So it is in one sense, that is to say, the statute applies to all designs, whether they add to the utility of the articles to which they are applied or not. But in considering the purposes and uses of the article in question for the sake of considering whether they are analogous or kindred to the purposes and uses of the article which is said to be the anticipation, I think it is legitimate to take into consideration that one purpose is ornamental and the other is useful. In addition to that which I have already mentioned there are other facts which to my mind are significant. The fact that as soon as this article was produced there was a large and immediate sale, is strong evidence that it was novel and original ; then there is the fact that Messrs. Boseck and Company, shortly after its production, adopted and copied it and put it in their catalogue on the top of one of the first pages (the catalogue was produced before us). Further, there was evidence of wellknown people in the jewellery trade who described the "Novelty" band as a novelty. The result is that all these facts lead me to the conclusion that although in view of the bracelet produced by Messrs. Cooke and Kelvey, the shape of the "Novelty" band by itself cannot be said to be new and original, the

1917

GAMMETER v. THE CONTROLLER OF PATENTS AND DESIGNS.

SANDERSON C. J.

application of it to a watch to be worn on the wrist was for a purpose so different from and for a use so dissimilar to the purpose and use of the bracelet that the design in question may be said to be original.

For these reasons, I think, that the appeal should be allowed and the application of the 22nd of February, 1916, granted.

In my judgment, the Controller ought to pay his own costs of the proceedings before Mr. Justice Fletcher and this Court, and Messrs. Boseck and Company ought to pay the costs of the appellant in respect of the hearing, so far as the merits are concerned, before Mr. Justice Fletcher, and the appellant ought to have the costs of this appeal with the exception of one day which was taken up in the argument with respect to the preliminary point, as to which there ought to be no costs before us. The costs will be on the basis as "of hearing."

I should like to say before parting with this case, that I am indebted to the learned counsel engaged in the case for their able arguments and for the assistance they have given me in this matter.

WOODROFFE J. This application was made under section 45 of the Specific Relief Act. It is not in my opinion barred by section 64 of the Designs Act. The action of the Controller was not justified by section 62 of that Act. We have then to see whether the application is justified on the merits. Mr. Justice Fletcher seems to have dealt with the question as one under section 64 of the Designs Act. But the appellant does not admit that that section applies, for, if it did, he could not get relief under section 45 of the Specific Relief Act. His case is that the merits are to be entered into under the provisions of section 45, under which provision the application is made.

As to the merits, in my opinion, the appellant has established his case. There is no question. I think, that it is a good design. It is found as a fact that it had never been previously applied to wrist watches : and, the fact that it had an immediate and lucrative sale strongly indicates that the article sold was a useful novelty. It was also copied by Messrs. Boseck and Company and inserted in their catalogue, and there given the first place. The case before Mr. Justice Fletcher was decided practically on one ground and one ground only, and that was that the design in question was not new, in that it had been anticipated by a bracelet of Messrs. Cooke and Kelvey which they had held in stock for about 5 years prior to August, 1915; the learned Judge after finding several points in favour of the applicant then says that "the case must stand or fall on the bracelet produced by Messrs. Cooke and Kelvey."

It has been argued by Mr. James that the band of the bracelet produced by Messrs. Cooke and Kelvey is not the same as the band of the design in question. Assuming for the sake of the argument, without deciding the point, that it is the same, there is, I think, novelty in applying what on this assumption is an old thing to a new use. If that is so, the design should be protected, provided it is not merely, to use the words of the cases, analogous. The present case does not seem to be within the proviso, though it may be that class-divisions do not necessarily determine whether one case is analogous to another; it seems to me that the fact that articles are in different divisions is a matter of some account. However this may be, in the present case we have here different purposes and different uses. A wrist band used to carry an ornament such as that produced by Messrs. Cooke and Kelvey, and a wrist band to carry a watch do not

1917

GAMMETER v. THE CONTROLLER OF PATENTS AND DESIGNS.

WOODROFFE J.

appear to me to be so analogous as to deprive the applicant of his claim to novelty. Further, the band is, in my opinion, original and differs from the other band produced, by its circular shape according to which it passes at the back of the watch, and as a consequence of that, produces a flattening which is referred to in the evidence.

In my opinion, therefore, the appeal succeeds and the applicant is entitled to the order which he sought.

O. M. *Appeal allowed.*

Attorneys for the appellant: *Chatterjee & Co.*

Attorneys for the respondents: *Sanderson & Co.*

CIVIL RULE.

Before Mookerjee and Walmsley JJ.

1917

June 19.

BIRESWAR MUKERJEE

v.

AMBIKA CHARAN BHATTACHARJEA.*

Limitation—Execution of money-decree—Part payment—Uncertified payment or adjustment—Civil Procedure Code (Act V of 1908), O. XXI, r. 2, sub-r. (3). Limitation Act (IX of 1908), s. 21, Sch. I, Art. 182.

Where a decree for money was made on the 24th November 1909 and an application for execution of the same was presented on the 7th June 1916 and where two payments were alleged to have been made in 1912 and 1913, respectively, neither of which was certified to the Court:

Held, that the application was *primâ facie* barred by limitation under Art. 182 of the Limitation Act

Held, also, that an uncertified payment or adjustment could not operate to prolong the period of limitation for an application for the execution of a decree under the Limitation Act.

*Civil Rule No. 241 of 1917, against the order of Asutosh Ghose, Judge of Small Cause Court of Serampore, dated Dec. 27, 1916.

Held, further, that under the Hindu Law, in the absence of the father, the mother was entitled to be the guardian of her infant sons in preference to their brother and was the "lawful guardian" under s. 21 of the Limitation Act.

Jogendra Nath Sarkar v. *Provath Nath Chatterjee* (1), *Kutubullah Sarkar* v. *Durga Charan Rudra* (2), *Bhajan Lal* v. *Cheda Lal* (3), and *Muhtaboo* v. *Gunesh Lal* (4) followed.

RULE obtained by Bireswar Mukerjee and others petitioners.

The facts briefly are these. On the 24th November 1909, the opposite party, Ambika Charan Bhattacharjea, obtained a decree for Rs. 145 against one Rashbehari Mukerjee, the father of the petitioners above-named. On the 7th June 1916, the decree-holder applied for the execution of the decree alleging that on the death of Rashbehari the petitioners became his heirs. Further, that the petitioner No. 1 had made two payments of Rs. 20 and Rs. 5 on the 8th October 1912 and the 9th June 1913, respectively, and endorsed the payments on the back of a certified copy of the decree. The petitioners alleged that they never paid any money to the decree-holder and the endorsements were made by the petitioner No. 1 alone without the actual payment of any money. That on the date of the first endorsement, the petitioner No. 1 was a minor and that the decree-holder in his execution petition described the mother of the petitioners as their guardian.

The learned Subordinate Judge, by his judgment, dated the 27th December 1916, remarked that "Bireswar was the eldest male member of the family comprised of himself and his minor brothers and in fact he looked after them and so he must be taken as the lawful guardian of the minors and was the duly

(1) (1913) 19 C. L. J. 126.
(2) (1912) 13 I. C. 424.
(3) (1914) 12 All. L. J. 825.
(4) (1854) (Beng.) S. D. A. 329.

1917

BIRESWAR MUKERJEE v. AMBIKA CHARAN BHATTACHARJEA.

authorised agent of his brothers [see ss. 20 and 21 of the Limitation Act"] and held the decree to be alive by the part-payments.

From this order the petitioners moved the High Court.

Babu Amarendra Nath Bose, for the petitioners, contended that as the two payments alleged to have been made in 1912 and 1913, respectively, were not certified to the Court they could not be taken into consideration for the purposes of keeping the decree alive within the meaning of O. XXI, r. 2, sub.-r. (3) of the Civil Procedure Code, 1908. Further, even if they were taken into account they would be of no consequence for the purposes of section 21 of the Indian Limitation Act, as the mother of the minors being alive the eldest brother could not be regarded as the lawful guardian of the minors: *Bhajan Lal* v. *Cheda Lal* (1), *Kutubullah Sarkar* v. *Durga Charan Rudra* (2), *Jogendra Nath Sarkar* v. *Provath Nath Chatterjee* (3).

No one appeared for the opposite party.

MOOKERJEE AND WALMSLEY JJ. The question for determination in this Rule is, whether an application presented on the 7th June 1916, for execution of a decree for money, made on the 24th November 1909, is or is not barred by limitation. The application is *primâ facie* barred by limitation under Article 182 of the second Schedule to the Indian Limitation Act. The decree-holder consequently seeks to escape from the bar of limitation by reference to two payments alleged to have been made by the eldest brother of the petitioners on the 8th October 1912 and the 9th June 1913,

(1) (1914) 12 All. L. J. 825. (2) (1912) 13 I. C. 424.
(3) (1913) 19 C. L. J. 126.

respectively. The petitioners argue, *first*, that as these payments were not certified, they cannot be taken into account; and, *secondly*, that even if taken into account they are of no avail under section 21 of the Indian Limitation Act. In our opinion, these contentions are well founded and must prevail.

As regards the first contention, it is not disputed that neither of these payments was certified to the Court; consequently, under Order XXI, rule 2, sub-rule (*3*) of the Civil Procedure Code, the payments cannot be recognised by any Court executing the decree. This view is supported by the decisions in *Jogendra Nath Sarkar* v. *Provath Nath Chatterjee* (1), *Kutubullah Sarkar* v. *Durga Charan Rudra* (2) and *Bhajan Lal* v. *Cheda Lal* (3). It may be observed that Order XXI, rule 2 (*3*) of the Code of 1908 is different in terms from section 258 of the Code of 1882. The present Code provides that a payment which has not been duly certified shall not be taken into account by any Court executing the decree. The previous Code provided that a payment which had not been certified should not be recognised as a payment or adjustment of the decree. This alteration in language justifies the inference that an uncertified payment or adjustment cannot now operate to prolong the period of limitation for an application for execution of a decree under the Indian Limitation Act. This interpretation is perfectly legitimate and, if adopted, will induce decree-holders to certify payments made to them out of Court.

As regards the second contention, we are of opinion that the payments which were made by the eldest brother of the petitioners, who were infants, while their mother was alive, cannot be said to have been

(1) (1913) 19 C. L. J. 126. (2) (1912) 13 I. C. 424.
(3) (1914) 12 All. L. J. 825.

1917

BIRESWAR MUKERJEE v. AMBIKA CHARAN BHATTACHARJEA.

made by a "lawful guardian" within the meaning of section 21 of the Indian Limitation Act. It is well settled that, under the Hindu Law, in the absence of the father, the mother is entitled to be the guardian of her infant sons in preference to their brother: *Muhtaboo* v. *Gunesh Lal* (1).

The Rule is made absolute and the order for execution as against the petitioners is set aside.

L. R. *Rule absolute.*

(1) (1854) (Beng.) S. D. A. 329.

APPELLATE CIVIL.

Before Mookerjee and Walmsley JJ.

1917

June 21.

SARAJU BALA DASI

v.

JOGEMAYA DASI.*

Court-fee—Suit for administration or account—Valuation for purposes of court-fees—Jurisdiction—Court-fees Act (VII of 1870) s. 7, cl. IV (f).

In an administration suit valued at Rs. 30,000 for purposes of jurisdiction, and at Rs. 100 for adjustment of account, and wherein court-fees were paid on the latter sum only, together with Rs. 10 for the approximate value of the claim for account:—

Held, that such a suit was in essence a suit for account within the meaning of s. 7, cl. IV (*f*) of the Court-fees Act, and that adequate court-fees had been paid on the plaint which could not be rejected.

Khatija v. *Shekh Adam Husenally Vasi* (1), *Sasi Bhushan Bose* v. *Maharaja Sir Manindra Chandra Nandy* (2), *Satya Kumar Banerjee* v. *Satya Kripal Banerjee* (3) followed.

APPEAL by the plaintiff, Saraju Bala Dasi.

*Appeal from Original Decree, No. 515 of 1914, against the decree of Upendra Chandra Mukerjee, Subordinate Judge of Hooghly, dated June 18, 1914.

(1) (1915) I. L. R. 39 Bom. 545. (2) (1916) 24 C. L. J. 448.
(3) (1909) 10 C. L. J. 503.

1917

SARAJU BALA DASI v. JOGEMAYA DASI.

The facts necessary for the purposes of this report are shortly these. The plaintiff, Saraju Bala Dasi, the widow of one Basanta Kumar Roy, instituted a suit for administration, for account and other incidental reliefs against the executors of the estate of her father-in-law, one Rajendra Nath Roy. The plaint contained the following: "Suit for administration. For the purposes of jurisdiction the claim is laid at Rs. 30,000 and the present claim for adjustment of account at Rs. 100." The plaintiff paid court-fees *ad valorem* on this sum of Rs. 100, and also paid an additional sum of Rs. 10, for the approximate value of the claim for account. The defendants contended amongst other things that, inasmuch as the plaintiff had valued the suit at Rs. 30,000, she was bound to pay the court-fees thereon, otherwise the suit should fail. On an issue framed accordingly, the learned Subordinate Judge held that, "the plaint should be stamped with the *ad volorem* fees according to the value of the claim, viz., Rs. 30,000," and called upon the plaintiff to pay the additional court-fee of Rs. 965. The plaintiff failed to carry out this order, whereupon the Court below rejected the plaint.

From this decision the plaintiff appealed to the High Court.

Babu Braja Lal Chakravarti and *Babu Biraj Mohan Majumdar*, for the appellant, contended that the present suit for administration and account was really a suit for account within the meaning of section 7, cl. IV (*f*) of the Court-fees Act, and the plaintiff need approximately value the claim for account only and pay court-fees accordingly: see *Khatija* v. *Shekh Adam Husenally Vasi* (1). If the suit were decreed for an amount larger than the claim, additional court-fees would have to be paid before such decree could be

(1) (1915) I. L. R. 39 Bom. 545.

1917

SARAJU BALA DASI v. JOGEMAYA DASI.

executed. In a suit for administration of trust in favour of creditors the same view found support: *Sasi Bhushan Bose* v. *Maharaja Sir Manindra Chandra Nandy* (1). In *Satya Kumar Banerjee* v. *Satya Kripal Banerjee* (2), this Court accepted the same view.

Babu Manomohan Bose, for the respondents.

MOOKERJEE AND WALMSLEY JJ. This is an appeal by the plaintiff against an order of rejection of the plaint, in a suit instituted by her against the executors of the estate of her father-in-law for administration, for accounts and for other incidental reliefs. She stated that the value of the estate left by her father-in-law was Rs. 30,000, but she valued the claim for accounts at Rs. 100. She paid court-fees *ad valorem* on this sum of Rs. 100, and also paid an additional sum of Rs. 10, apparently on the ground that the claim for administration was incapable of accurate valuation, at least at that stage. The defendants contended that the court-fee paid by the plaintiff was inadequate and that the suit could not consequently proceed. Their argument in substance was that, as for purposes of jurisdiction, the plaintiff had valued the suit at Rs. 30,000, she was bound to pay the court-fees upon that valuation. The Subordinate Judge thereupon framed an issue to the following effect: "Has the plaint been insufficiently stamped?" On the trial of this issue, he held that the plaint was insufficiently stamped and called upon the plaintiff to pay additional court-fees of Rs. 965. This order was not carried out, with the consequence that the plaint was rejected. In our opinion, the view taken by the Subordinate Judge cannot be supported.

The decision of the Bombay High Court, in the case of *Khatija* v. *Shekh Adam Husenally Vasi* (3),

(1) (1916) 24 C. L. J. 448. (2) (1909) 10 C. L. J. 503.
(3) (1915) I. L. R. 39 Bom. 545.

shows that a suit for administration and account is in essence a suit for accounts within the meaning of section 7, clause IV (*f*) of the Court-fees Act, 1870, and, that, in a suit of this description the plaintiff is competent to value the claim for accounts approximately and to pay court-fees thereon. Sir Basil Scott C. J. pointed out that if ultimately a decree should be passed in favour of the plaintiff for a larger amount than that covered by the court-fees already paid, the plaintiff would be precluded by the provisions of section 11n of the Court-fees Act, from executing the decree until the fee payable on the whole amount of the decree had been paid This view is confirmed by a reference to Form 43 of Schedule I of the Civil Procedure Code of 1908, and was adopted by this Court in *Sasi Bhushan Bose* v. *Maharaja Sir Manindra Chandra Nandy* (1), which arose out of a suit for administration and accounts brought by one of the creditors of a debtor against the trustee of his estate. A similar position had been accepted as sound in the earlier case of *Satya Kumar Banerjee* v. *Satya Kripal Banerjee* (2). We are clearly of opinion that adequate court-fees had been paid upon the plaint, which could not consequently have been rejected.

The result is that this appeal is allowed, the order of the Court below set aside, and the case remitted to the Subordinate Judge, in order that it may be tried on the merits. An order will be made in favour of the plaintiff appellant under section 13 of the Court-fees Act, entitling her to obtain a return of the court-fees paid on the memorandum of appeal presented to this Court. The appellant is entitled to her costs both here and in the Court below.

L. R. *Appeal allowed.*

(1) (1916) 24 C. L. J. 448. (2) (1909) 10 C. L. J. 503.

APPELLATE CIVIL.

Before Mookerjee and Newbould JJ.

MANMATHA NATH DEY

v.

GADADHAR MANA.*

1917

June 26.

Appeal—Dismissal for default—Order of Special Judge—Bengal Tenancy Act (VIII of 1885) ss. 106, 109A, sub-s. (2)—Civil Procedure Code (Act V of 1908) O. XLI, rr. 17, 19; O. XLIII, r. 1 cl. (t).

An appeal lies from an order refusing to rehear an appeal dismissed for default, even though such appeal has been preferred under s. 109A, sub-s. (2) in a suit under s. 106 of the Bengal Tenancy Act.

Mothur Chandra Majumdar v. *Tara Sunkar Ghose* (1) distinguished.

APPEAL by Manmatha Nath Dey and another, the appellants.

The facts briefly are these. The appellants instituted a suit under s. 106 of the Bengal Tenancy Act. The suit being dismissed by the Court of first instance, the appellants preferred an appeal to the Special Judge, under s. 109A, sub-s. (2) of the Bengal Tenancy Act.

On the 9th December 1914, the appeal was called on for hearing. Neither the appellants nor the respondents appeared, whereupon the said Special Judge dismissed the appeal. On the 16th December 1914, the appellants applied to the said Judge praying for the restoration of the said appeal. On the 25th January 1915, the Special Judge dismissed the application.

From this order the appellants appealed to the High Court.

*Appeal from Order, No. 200 of 1915, against the order of W. N. Delevingne, District Judge of Midnapore, dated Jan. 26, 1915.

(1) (1903) 7 C. W. N. 440.

Babu Pravash Chandra Mitter and *Babu Tarkeswar Pal Chowdhry*, for the appellants.

Babu Prabodh Chandra Chatterjee and *Babu Gour Chandra Pal*, for there spondent.

MOOKERJEE AND NEWBOULD JJ. This appeal is directed against an order whereby the Court below has refused to set aside an order of dismissal of an appeal for default. A preliminary objection has been taken to the competence of the appeal.

The suit was instituted under section 106 of the Bengal Tenancy Act, and was dismissed by the Court of first instance. An appeal was thereupon preferred to the Special Judge under sub-section (*2*) of section 109A. When the appeal was taken up for disposal, neither the appellant nor his pleader appeared and it was consequently dismissed for default. An application was thereupon made to rehear the appeal. That application has been refused, and the present appeal is directed against this last order. On behalf of the respondent it is contended that the appeal is incompetent, and reliance is placed upon the decision of this Court in *Mothur Chandra Majumdar* v. *Tara Sunkar Ghose* (1). In our opinion, that case is clearly distinguishable and has no application to the circumstances of this appeal. There, an order of remand was made in an appeal preferred under section 109A against the decision in a suit under section 106. An appeal was thereupon preferred to this Court against the order of remand. A preliminary objection was taken that the appeal was incompetent and this contention prevailed. Mr. Justice Banerjee observed that an appeal lay to the High Court from an appellate decision of the Special Judge, only under Chapter XLII of the Code of Civil Procedure of 1882, which has now been

(1) (1903) 7 C. W. N. 440.

1917

MANMATHA NATH DEY v. GADADHAR MANA.

replaced by sections 100 to 103, of the Code of 1908. An appeal against the order of remand, if it lay at all, would lie to this Court, not under Chapter XLII of the Code of 1882, but under section 588 which found a place in Chapter XLIII of the Code. As Chapter XLIII was nowhere mentioned in section 109A, the inference was drawn that an appeal did not lie to this Court from an order of remand made by a Special Judge in the exercise of his appellate powers under sub-section (*2*) of section 109A. In the present case, section 109A, sub-section (*2*), makes the provisions of the Civil Procedure Code relating to appeals, applicable to the appeal before the Special Judge. One of these provisions is embodied in Order XLI, rule 17, which provides as follows: "Where on the day fixed, or on any other day, to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed." The Special Judge in the exercise of the power thus vested in him did dismiss the appeal. Thereupon rule 19 became applicable. That rule provides that, where an appeal is dismissed under rule 17, the appellant may apply to the Appellate Court for the re-admission of the appeal. This attracts the operation of Order XLIII, rule I, clause (*t*), which provides that an appeal shall lie under the provisions of section 104, from an order of refusal under rule 19 of Order XLI to re-admit an appeal. No question arises as to the applicability of Chapter XLII of the Code of 1882, or of the corresponding provisions of the Code of 1908, as under section 2 of the latter Code, an order of dismissal for default is not a decree. There is no escape from the position that this appeal is competent under Order XLIII, rule I, clause (*t*); in other words, an appeal lies from an order refusing to rehear an appeal

1917

MANMATHA NATH DEY v. GADADHAR MANA.

dismissed for default, even though such appeal has been preferred under section 109A, sub-section (2) in a suit under section 106 of the Bengal Tenancy Act.

As regards the merits, we are of opinion that this appeal should be allowed and the appeal preferred under section 109A, which was dismissed for default, restored. This order, however, is made on terms. The appellant will pay to the respondent two gold mohurs as costs here and in the Court below. This sum must be deposited within one month of the arrival of the record in that Court. If the deposit is made, as directed, the appeal will stand restored and heard on the merits. If it is not so deposited, this appeal will stand dismissed with costs.

L. R. *Appeal allowed.*

APPELLATE CRIMINAL.

Before Chitty and Richardson JJ.

TAHER KHAN AND OTHERS

v.

EMPEROR.*

1917

Aug. 14.

Abduction—Abduction of married woman with intent to compel her to marry another—"Marry," meaning of—Penal Code (Act XLV of 1860), s. 366—Valid Marriage.

Section 366 of the Penal Code applies to the case of abduction of a married woman with intent to compel her to marry. The word "marry" therein implies, as in s. 494, going through a form of marriage, whether the same is in fact valid or not.

ONE Wajidunnessa Bibi, after the death of her husband at Dhubri, went to live with her mother at Paikandi village. Daliladdi, an influential neighbour

* Criminal Appeal No. 421 of 1917, against the order of B. Ghatak, Sessions Judge of Faridpur, dated June 29, 1917.

1917

TAHER KHAN v. EMPEROR.

of theirs, offered her marriage, but she refused him. A marriage was, however, arranged between her and one Piziruddin by her maternal uncle, and she went through a *nika* ceremony with the latter on the 18th April 1917. The next day Daliladdi, accompanied by the four appellants, entered her premises and carried her off forcibly to the house of the appellant, Mobarak Ali. It appeared that while detained there she received another proposal of marriage from Daliladdi. Her husband, Piziruddin, failing to rescue her, went to the Balikandi police-station and laid a charge against Daliladdi and the appellants under section 366 of the Penal Code. The Sub-Inspector thereupon proceeded to the place of occurrence, released Wajidunnessa at about 4 P.M., and took up the investigation. He thereafter sent up the four appellants for trial. The Subdivisional Officer of Goalundo, after a preliminary inquiry, committed the appellants to the Court of Session at Faridpur. They were tried before the Sessions Judge and two assessors under section 366, the intent laid in the charge being to compel her to marry Daliladdi against her will. The assessors were in favour of acquittal on the ground that the criminal intent charged had not been established. The Judge, disagreeing with the assessors, convicted and sentenced the appellants, under the abovementioned section, to two years' rigorous imprisonment each. They appealed to the High Court.

Babu Manmatha Nath Mukherjee, *Babu Amarendra Nath Bose* and *Babu Pankaj Kumar Ganguli*, for the appellants.

The Deputy Legal Remembrancer (*Mr. Orr*) and *Mr. Camell*, for the Crown.

RICHARDSON J. The four appellants were tried before the Sessions Judge of Faridpur sitting with

1917

TAHER KHAN v. EMPEROR.

RICHARDSON J.

two assessors on a charge framed under section 366 of the Indian Penal Code. The assessors were for acquitting the appellants. The learned Sessions Judge has convicted them and sentenced them each to rigorous imprisonment for two years.

The actual facts are simple enough. The abducted woman, Wajidunnessa, had been living with her husband at Dhubri. On her husband's death she returned as a widow to live with her mother, Abidunnessa, at Paikandi in the Faridpur district. While there she received a proposal of marriage from one Daliladdi. The proposal was distasteful to her, Daliladdi being an old man with wife and children, and she, therefore, refused. She and her mother, however, came to the conclusion that it was desirable that she should marry a man who would reside with them and also maintain the mother. She, accordingly, on the 18th April last, entered into a marriage in *nika* form with one Piziruddin. On the following day the four appellants with Daliladdi came to her house and took her away by force to the house of the appellant, Mobarak Ali. There is evidence that, while she was at that house, she received another proposal of marriage from Daliladdi.

The abduction took place in broad daylight and does not seem to have been accompanied with much force or violence, but there is no reason to suppose that the woman, Wajidunnessa, went with the appellants willingly. Both the learned Sessions Judge and the assessors appear to have agreed as to the facts proved in their main outline. The assessors, however, felt some difficulty in finding that the intention charged, namely, that the woman should be compelled to marry Daliladdi against her will, had been sufficiently established by the evidence. We have been taken through the depositions of the

1917

TAHER KHAN v. EMPEROR.

RICHARDSON J.

witnesses, and having considered those depositions we are satisfied that the learned Sessions Judge was right in the conclusion that the accused abducted the woman with the criminal intent necessary to an offence under section 366 of the Indian Penal Code.

In this Court it is suggested that section 366 does not apply to the case of the abduction of a married woman. It is suggested that that might be an offence under some other section of the Code, for instance, section 498. We see no reason to doubt, however, that the word "marry" in section 366 has the same meaning as the same word in section 494. What it means is the going through a form of marriage, whether the marriage should prove in fact legal and valid or illegal and invalid. If the facts and the law applicable to them are as we have stated, the question in this case narrows down simply to the question of sentence.

The appellants, as we have said, have been sentenced each to two years' rigorous imprisonment. In the circumstances that sentence seems to us to be excessive. If we reduce it, however, it is in the hope that the appellants will not molest either Wajid-unnessa or her mother or husband again. If they do so they may find themselves in a worse position than they are now. On the whole, we are of opinion that the ends of justice will be met by reducing the sentence passed on each of the accused to a sentence of rigorous imprisonment for six months; and we order accordingly.

CHITTY J. concurred.

E. H. M.

APPELLATE CIVIL.

Before Woodroffe and Shamsul Huda JJ.

RAJANI KANTA MOOKERJEE

v.

SECRETARY OF STATE FOR INDIA.*

1917

Aug. 17.

Limitation—Bengal Tenancy Act (VIII of 1885), ss. 104H, 111A—Scope of s. 104H—Limitation governing suits under s. 104H—Reliefs outside s. 104H, but within proviso to s. 111A.

Section 104H of the Bengal Tenancy Act only refers to suits by a person aggrieved by an entry of rent settled in a Settlement Rent Roll prepared under ss. 104F to 104H or by an omission to settle such a rent and suits, falling under that section, are governed by the special limitation provided in that section.

Where reliefs claimed are outside the scope of s. 104H and fall within the proviso to s. 111A, the limitation applicable is that provided by article 120 of the second schedule to the Limitation Act.

Promoda Nath Roy v. *Asiruddin Mandal* (1) followed.

APPEAL by Rajani Kanta Mookerjee and others, the plaintiffs.

This appeal arose out of a suit for declaration of plaintiffs' occupancy right to certain schedules of land entered in the plaint of (schedule *cha* representing the entire land) and for settlement of fair rents of their holding and a declaration of the time from which such rents were to take effect. The plaintiffs' case was that at the time of the recent settlement of 1906-1909 they were in possession of the entire land in suit (as described in schedule *cha*) but the Revenue offices wrongly and illegally adjudged their title to schedule *ga* land only and recorded their

* Appeal from Original Decree, No. 39 of 1915, against the decree of Ramesh Chandra Bose, Subordinate Judge of Noakhali, dated Dec. 8, 1914.

(1) (1911) 15 C. W. N. 896.

1917

RAJANI KANTA MOOKERJEE v. SECRETARY OF STATE FOR INDIA.

title thereto as tenure holders (instead of as occupancy raiyats) and settled the rents deducting 30 per cent. for their allowance as such and recorded their sub-tenants as occupancy raiyats and wrongly excluded the *gha* and *una* schedules altogether from their lands. Against these proceedings of the Revenue officer the plaintiffs preferred an appeal to the Divisional Commissioner who, having heard the parties, sent up the appeal to the Director of Land Records. The latter, after hearing arguments on both sides, but without delivering judgment, sent the record to the Revenue Board on 15th April, 1910. The Board, again, after hearing both sides, sent up the record to the Lieutenant-Governor of Eastern Bengal and Assam without delivering any judgment. The judgment of the Board was eventually forwarded to the Divisional Commissioner with a letter on the 13th of October, 1911. The plaintiffs were thereafter informed of the decision of the Board dismissing their appeal and upholding their right as tenure-holders in respect of schedule *g i* land only. Although that decision bears date of the 2nd of May, 1911, it was not delivered and was not made final pending the approval of Government. The plaintiffs submitted that the judgment of the Board should be taken as delivered only after it was forwarded to the Divisional Commissioner on the 13th of October, 1911. The plaintiffs prayed for declaration of his occupancy rights to his entire lands represented by the schedule *cha*.

Four written statements were filed. At the commencement of the trial the plaintiffs by a petition and the remaining contesting defendants (including Government) by a verbal notice asked the Court to take up and decide the issue regarding limitation in the first instance. The prayer was allowed and evidence was taken with the result that the plaintiffs'

suit was dismissed as being barred by limitation under the special limitation provided in section 104H of the Bengal Tenancy Act. Against this order the plaintiffs appealed to the High Court.

Babu Gunada Charan Sen and *Babu Satish Chandra Bhattacharyya*, for the appellants.

Babu Ram Charan Mitra and *Babu Ramesh Chandra Sen*, for the respondents.

Cur. adv. vult.

WOODROFFE AND SHAMSUL HUDA JJ. The facts of this case are shortly these. In the course of a proceeding under Chapter X of the Bengal Tenancy Act for settlement of rents and preparation of settlement Rent Roll in accordance with the provisions of section 104 of that Act in respect of a Mahal called *char* Khundkar bearing tauzi No. 1516 of the Noakhali Collectorate, plaintiffs claimed that they were occupancy raiyats in respect of all the lands described in schedule *cha* of the plaint. The Revenue officer, however, held that plaintiffs were tenure-holders and only in respect of lands included in schedule *ga* covering an area of 1,309 bighas 9 cottas 8 chittaks and he assessed the rent payable by the plaintiffs on the footing of their being tenants of that class by giving them an allowance of 30 per cent. on the assets. The plaintiffs being recorded as tenure-holders, those holding under them were recorded as occupancy raiyats. Against these orders of the Revenue officer passed prior to the final publication of the Record of-Rights, under rules framed by the Local Government, an appeal lay to the Commissioner of the Division and the plaintiffs filed an appeal to the Commissioner of the Chittagong Division who heard arguments but did not deliver judgment. On the 30th of August, 1909, while the appeal was still pending before the

1917

RAJANI KANTA MOOKERJEE v. SECRETARY OF STATE FOR INDIA.

Commissioner the record was finally published. Meanwhile, the Local Government framed new rules whereby the authority of the Director of Land Records was substituted for that of the Commissioner of the Division for purpose of hearing appeals under section 104G and although nothing was said in the rules regarding pending appeals, the Commissioner of the Chittagong Division sent the appeal to the Director of Land Records for disposal. The parties seem to have acquiesced in the transfer of the appeal to the Director of Land Records who heard the parties and came to the conclusion :—

(*i*) That the plaintiffs' jote covered an area slightly in excess of 1309 bighas 9 cottas and 8 chittaks.

(*ii*) That the plaintiffs were tenure-holders.

(*iii*) That those holding under the plaintiffs were occupancy raiyats.

(*iv*) That the rent entered as payable to the plaintiffs by the tenants holding under them should in certain cases be raised.

(*v*) That 30 per cent. on the assets allowed to the plaintiffs by the Revenue officer was a correct basis for assessing the rent payable by the plaintiffs and should stand.

The decision of the Director of Land Records on points (*i*) and (*iv*) involved an alteration in the record as finally published. For this and for certain other questions which arose under Regulation VII of 1822, with which we are not concerned, the Director of Land Records referred the case to the Board of Revenue under section 104G (*2*) of the Bengal Tenancy Act as well as under the provisions of the said Regulation. This order of the Director of Land Records is dated the 15th of April, 1910. The judgment of the Board of Revenue is dated the 2nd of May, 1911, and it affirms the decision of the Director of Land Records on all the points.

The present suit is brought by the plaintiffs for a declaration that they are occupancy raiyats and not tenure-holders, that they are occupancy raiyats in respect of all the lands described in schedule *cha* of the plaint and not in respect of lands of schedule *ga* only, that the assessment of rent made on the basis of their being tenure-holders and the refusal of the Revenue authorities to recognize their tenancy in respect of the remaining lands of schedule *cha* was illegal, that the Revenue authorities were wrong in not fixing a time from which such rent was to take effect. The reliefs claimed by the plaintiffs are the following:—

(*ka*) That the plaintiffs may be declared as occupancy raiyats.

(*kha*) That the land of schedule *cha* below may be declared as included in the right which the plaintiffs may be held to have.

(*ga*) That proper rent may be fixed of the lands in the possession of the plaintiffs and time for payment of the said rent may be fixed.

(*gha*) That the tenants under the plaintiffs may be held to have no right as settled raiyats or occupancy raiyats.

(*una*) That the tenants under the plaintiffs may be declared to be *korfa* tenants (under-tenant).

(*cha*) That a decree may be passed for costs in Court with future interest.

(*chha*) That a decree may be passed granting any other relief which the plaintiffs are entitled to get in the fair judgment of the Court.

The suit was described in the plaint as one under section 104H and section 111 A of the Bengal Tenancy Act and section 42 of the Specific Relief Act. The learned Subordinate Judge, without entering into the merits of the case, has dismissed the suit on the ground of limitation. He holds that the suit is one under

1917

RAJANI KANTA MOOKERJEE v. SECRETARY OF STATE FOR INDIA.

section 104H of the Bengal Tenancy Act and not having been brought within six months from the date of the certificate of final publication of the Record-of-Rights or within six months from the date of the disposal of the appeal by the Board of Revenue is barred by the special limitation provided in that section.

On appeal, it has been urged before us—

(*a*) That the plaintiffs were not aware of the date on which the Board of Revenue gave their decision and that therefore the date of decision should, for the purpose of limitation, be deemed to be the date on which the plaintiffs became aware of such decision and that, as a matter of fact, they came to know of it after a copy of the judgment was forwarded to the Commissioner on the 13th of October, 1911.

(*b*) That the Commissioner of the Division was wrong in not deciding the appeal himself and its transfer to the Director of Land Records was illegal and as the Commissioner to whom the appeal lay has passed no decision on the appeal, the suit cannot be said to have been filed more than six months after such decision.

(*c*) That the suit is not one under section 104H and therefore the special limitation provided by that section does not apply.

As regards the first and the second points, it appears to us that the Commissioner having transferred the appeals to the Director of Land Records and the plaintiffs, who were the appellants, having raised no objection to such transfer, but having on the other hand acquiesced in his jurisdiction by appearing and arguing the appeal before him should not be allowed to raise the objection now. Even if plaintiffs' contention is correct, they must be held to have abandoned their appeal to the Commissioner and the suit, if it is one under section 104H, would still be barred. The

Director of Land Records delivered his judgment on the 15th of April, 1910, and if he was the final appellate authority the suit filed on the 12th of April, 1912, was clearly out of time.

Assuming, however, that the appeal to the Director of Land Records was not finally disposed of until the Board of Revenue gave their decision on the recommendations made by the Director we still think that the date of such decision must be taken to be the 2nd of May, 1911, *i.e.*, the date which it purports to bear and that the date of plaintiffs' knowledge is wholly immaterial. Plaintiffs have not shown that there has been any error in dating the judgment and we must presume that it has been correctly dated.

As regards the third point, we are of opinion that except in so far as the plaintiffs ask for proper rent to be fixed for lands regarding which their tenancy has been recognised and for a date to be fixed from which such rent is to take effect, the other reliefs claimed in the suit are outside the scope of section 104H. That section only refers to suits by a person aggrieved by an entry of a rent settled in a Settlement Rent Roll prepared under sections 104F to 104H or by an omission to settle such a rent. Therefore, in so far as the plaintiffs are aggrieved by the rent settled as payable by them as tenure-holders in respect of land of schedule *ga* and desire to have such entry corrected, the suit falls within the scope of section 104H and has rightly been held to be barred by limitation. It may also appear at first sight that as regards lands as to which the plaintiffs' right as tenants has been negatived, the case is one of omission to settle a rent, but it cannot be said that so far as the plaintiffs are concerned they are aggrieved by such omission. They are aggrieved not by the omission to settle their rent, but by the omission to recognise their tenancy. We, therefore, think

1917

RAJANI KANTA MOOKERJEE v. SECRETARY OF STATE FOR INDIA.

that the plaintiffs claim for reliefs other than the one marked *ga* is not barred by limitation. It is true that the declarations asked for, if granted, would afford grounds for alteration of entries as to rents but the mere fact that under the law plaintiffs cannot get such an alteration effected by means of this suit, is not enough to deprive them of the right to get these declarations which may be of value to them apart from the question of correction of the settlement Rent Roll regarding the rent entered in it or omitted from it. These declarations are not necessarily ancillary to the prayer for settlement of a new rent.

We, therefore, hold that relief claimed in paragraph *ga* is barred under section 104H, but that the claim for other reliefs is outside the scope of that section and to this extent the suit is one under section 42 of the Specific Relief Act to which the limitation applicable is that provided by Article 120 of the first Schedule of the Limitation Act. The right to maintain such a suit under certain conditions, is expressly saved by the proviso to section 111A of the Bengal Tenancy Act. The view we take is supported by a decision of Chitty and Chatterjea JJ. in the case of *Raja Promoda Nath Roy* v. *Asiruddin Mandal* (1).

The question whether the suit is otherwise competent and is properly framed to enable the Court to grant any of the reliefs asked for, is one which we need not consider at this stage.

Upon this view of the case we dismiss the suit with regard to prayer *ga*, but as regards the other prayers we set aside the decision of the Court below and remand the case for the trial of the other issues. Costs will abide the result.

S. K. B. *Case remanded.*

(1) (1911) 15 C.W.N. 896.

ORIGINAL CIVIL.

Before Chaudhuri J.

BANK OF UPPER INDIA

v.

THE ADMINISTRATOR-GENERAL OF BENGAL.*

1917

Aug. 20.

Administration—Crown debt, priority of—Still-head duty—English mortgage of immoveables—Fixtures—Hypothecation of moveables and shares.

The owner of a distillery died, leaving a certain debt due to Government as still-head duty in respect thereof, as also two mortgages (in the English form) on the land and premises together with the buildings and structures thereon constituting the distillery, the first mortgage being in favour of the Alliance Bank of Simla, Ld., and the second in favour of the Delhi and London Bank, Ld. The moveables appertaining to the distillery were similarly hypothecated to the said Banks and certain shares registered in the deceased's name were hypothecated to and deposited with the Alliance Bank.

Held, that so far as the immoveable properties were concerned including the fixtures, the Crown was not entitled to priority, that the Alliance Bank as first mortgagee ranked first, but the Delhi and London Bank as second mortgagee was not entitled to priority over the Crown.

Dost Muhammad Khan v. *Maniram* (1), *Rama Chandra* v. *Pitchai Kanni* (2), *Ibrahim Khan Sahib* v. *Rangasami Naicken* (3) followed.

Mersey Steel and Iron Co. v. *Naylor Benzon & Co.* (4), *The Secretary of State for India* v. *Bombay Landing and Shipping Co.* (5), *Giles* v. *Grover* (6), *The King* v. *Cotton* (7), *Ganpatputaya* v. *The Collector of Kanara* (8), *Puthia Valappil Barga* v. *Veloth Assenar* (9), *Gayanada Bala Dassee* v. *Butto Kristo Bairagi* (10), *The Collector of Moradabad* v. *Muhammad Daim* (11) referred to.

* Application in Original Civil Suit No. 534 of 1912.

(1) (1907) I. L. R. 29 All. 537.
(2) (1883) I. L. R. 7 Mad. 434.
(3) (1905) I. L. R. 28 Mad. 420.
(4) (1882) L. R. 9 Q. B. D. 648 ; (1884) L. R. 9 A. C. 434.
(5) (1868) 5 Bom. H. C. R. (O. C.) 23.
(6) (1832) 9 Bing. 128.
(7) (1751) Parker 112.
(8) (1875) I. L. R. 1 Bom. 7.
(9) (1902) I. L. R. 25 Mad. 733.
(10) (1906) I. L. R. 33 Calc. 1040.
(11) (1879) I. L. R. 2 All. 196.

1917

BANK OF UPPER INDIA v. THE ADMINISTRATOR-GENERAL OF BENGAL.

Re Henley & Co. (1), *New South Wales Taxation Commissioners* v. *Palmer* (2), *Rex* v. *Wells* (3) distinguished.

So far as the moveable properties and the shares were concerned, the Alliance Bank did not have priority over the Crown.

Harrold v. *Plenty* (4) followed.

EDWARD JOHN RICHARD DYER, who was the proprietor of the Amritsar Distillery Company in the Punjab, died on the 20th January 1911.

By an English mortgage, dated the 10th April 1908, in order to secure an advance of Rs. 1,00,000 together with interest thereon, Dyer had mortgaged the land and premises together with the buildings and structures thereon known as the Amritsar Distillery, as also the goodwill thereof, the right to carry on the said business, and the machinery and plant thereof, to the Alliance Bank of Simla, Ld. Certain shares belonging to Dyer and registered in his name were similarly mortgaged to and deposited with the said Bank. By an English mortgage, dated the 2nd November 1910, Dyer had further mortgaged the Amritsar Distillery to the Delhi and London Bank, Ld., to secure advances of about Rs. 4,00,000.

At the date of Dyer's death, there was due to the Punjab Government the sum of Rs. 1,86,112-6-10 as arrears of still-head duty in respect of the distillery.

Dyer left a will, dated the 6th June 1905, appointing his widow and others trustees, but appointing no executor. From the date of his death the distillery was carried on by the manager, Frederick George Carter, with the knowledge and concurrence of the widow, the Alliance Bank of Simla, Ld., the Delhi and London Bank, Ld., and the Punjab Government.

As the widow was unable to furnish security on the 28th March 1912, the Administrator-General of

(1) (1878) L. R. 9 Ch. D. 469.
(2) [1907] A. C. 179.
(3) (1812) 16 East 278.
(4) [1901] 2 Ch. 314.

Bengal applied for and obtained Letters of Administration with copy of the will annexed.

On the 27th May 1912, the present administration suit was brought by the Bank of Upper India, Ld., as an unsecured creditor, and by a decree, dated the 30th August 1912, a reference was directed to the Assistant Referee. By an order of this Court, dated the 29th August 1913, the Administrator-General was appointed Receiver of the distillery with power to carry on the same with a view to the sale thereof.

Owing to a proposal by the Administrator-General to sell the property in his hands, with the consent of the mortgagees, the Punjab Government, on the 30th September 1913, attached the machinery, plant, stock and other moveable properties of the distillery by warrants issued under section 34 of the Excise Act and section 70 of the Punjab Land Revenue Act.

On the 3rd May 1915, the Administrator-General applied to this Court for leave to sell the Amritsar Distillery as a going concern, free from encumbrances, but without prejudice to the rights of the Punjab Government and of the mortgagees. On the 2nd June 1915, an order was made with consent to that effect; the attachments were withdrawn by the Government, and the distillery was sold on the 29th March 1916.

On the 2nd September 1915, the matter had come before CHAUDHURI J., in connection with a claim by the Administrator-General for a refund of certain money by the Punjab Government, and his Lordship had held that the sum was refundable.

The Assistant Referee made his report on the 7th April 1916 and the matter now came before his Lordship for further directions on report.

The assets of the estate were insufficient to pay the debts. The Punjab Government in addition to their rights under the Excise Act, claimed priority for their

1917

BANK OF UPPER INDIA v. THE ADMINISTRATOR-GENERAL OF BENGAL.

claim over all other debts as a Crown debt. The question for determination now was whether such priority existed in law, as against the mortgages in favour of the two Banks.

Mr. Buckland, for the Alliance Bank of Simla, Ld.
Mr. Langford James, for the Punjab Government.
Mr. Gregory, for the Administrator-General.

Cur. adv. vult.

CHAUDHURI J. This matter was before me on the 2nd September 1915 in connection with the claim of the Administrator-General of Bengal for the refund of a certain sum by the Punjab Government, which that Government claimed the right to set off against the amount which was due to it, for still-head duty.

The question which now comes up for consideration arises out of the claim of that Government to priority, in respect of the said amount for still-head duty over the Alliance Bank of Simla, Ld., and the Delhi and London Bank, claimants Nos. 34 and 33, who are mortgagees.

The deceased died on the 20th January 1911. This suit was instituted on the 27th May 1912 by the plaintiff Bank as unsecured creditors. Letters of Administration to the estate were granted by this Court to the Administrator-General on the 28th March 1912. The mortgages to the present claimants were executed on the 10th April 1908 and the 2nd November 1910, respectively. By an order made by this Court on the 29th August 1913 the Administrator-General was appointed Receiver of the Distillery Company with power to carry on the business with a view to the sale thereof. There was still-head duty due to the Punjab Government at the time of the death of the deceased. For the purpose of enforcing its claim warrants of attachment of the machinery, plants, stock and other

moveable properties of the Distillery at different places were executed under section 34 of the Excise Act and section 70 of the Punjab Land Revenue Act. These attachments were issued on the 30th September 1913, for Rs. 1,84,926-0-3. The amount owing appears not to have been definitely settled at the time. These attachments were issued in consequence of the proposed sale of some of the properties by the Administrator-General who had obtained the consent of the mortgagees. Certain steps were taken for the sale of those properties and they were sold, but the sale was cancelled, and the properties in respect of which the warrants of attachment had been withdrawn, were subsequently reattached by the Punjab Government. The Administrator-General then applied to this Court for leave to sell, and on the 13th February 1914 leave was given to him to sell the land, buildings, plants, machinery, etc., of the sugar factories at certain places and to hold the proceeds subject to all encumbrances, attachments and distraints justly made on those properties subject to the further orders of this Court. On the 3rd May 1915 the Administrator-General applied for leave to sell the Amritsar Distillery as a going concern, free from encumbrances, but without prejudice to the rights of the Punjab Government and of the mortgagees. An order was made by consent to that effect on the 2nd June 1915. The distillery was sold on the 29th March 1916. There was a dispute as to a sum of Rs. 17,167-8 paid to the Government for duty on certain spirits supplied to troops by the distillery after the death of the testator. The Administrator-General claimed that it should be refunded, but the Government said that they were willing to refund, provided the amount was set off against their claim. I held on the 2nd September 1915 on the materials then before me, that this amount was refundable by

1917

BANK OF UPPER INDIA v. THE ADMINISTRATOR-GENERAL OF BENGAL.

CHAUDHURI J.

the Government and it has now been reported by the Assistant Referee as an outstanding asset of the estate. This is the position of the contending parties at present. The attachments by the Government were withdrawn and the sales were effected free from encumbrances, but such sales were without prejudice to their rights. The Government in addition to their rights under the Excise Act claim priority over all other debts as Crown debts. The mortgage to the Alliance Bank is in respect of the leasehold properties mentioned as items 5, 6 and 7 of Part II of schedule A to the Referee's report, and upon the distillery and the buildings, plants and machinery thereof, item 1 of Part II of schedule A, and also upon certain shares belonging to the deceased mentioned as item 7 (*b*) of Part I of the said schedule. The mortgage to the Delhi and London Bank is a second mortgage of the same properties and a first mortgage of the shares, items X to W W of Part I of the said schedule, and of certain other securities held by the Bank, mentioned in schedule E, consisting of shares. The assets of the estate are wholly insufficient to pay off the debts. The administration of the estate therefore being under a decree of this Court is governed by Order XX, rule 13, sub-clause (*2*), under which the same rules have to be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities proveable, as are in force in respect to estates of persons adjudged or declared insolvent within our local limits, that is to say, under section 49 of the Presidency Towns Insolvency Act of 1909, which provides that in the distribution of the property all debts due to the Crown shall be paid in priority. The question raised is whether there is such priority against the mortgages in favour of the Alliance Bank of Simla, Ld., and the Delhi and London Bank.

In England under the old law it was settled that the Bankruptcy Statutes did not bind the Crown, but owing to the Bankruptcy Act of 1883, as amended, so far as actual proof in bankruptcy goes, the Crown appears to be on the footing of an ordinary creditor, although the provisions relating to the remedies against the property of the debtor and the general effect of section 150 of that Act on the rights of the Crown is by no means clear in every respect. But we need hardly refer to the English Law, as under the Civil Procedure Code we have to consider the matter in view of our Insolvency Act. Order XX, rule 13 (*2*), provides that the same rules shall be observed "as to respective rights of secured and unsecured creditors and as to debts and liabilities proveable." This rule closely follows section 25 of the Judicature Act of 1873 in which the same words were interpreted by Jessel M. R. as meaning debts and liabilities which can be proved and the manner in which they are to be proved: see *Mersey Steel & Iron Co.* v. *Naylor Benzon & Co.* (1), which was affirmed by the House of Lords (2). It is argued on behalf of the Punjab Government that in this country a Crown debt is entitled to precedence over every other kind of debt, whether secured or unsecured. This has been based upon a passage in Dr. Ghose's work on Mortgages, 4th edition, vol. 1, page 415, and the cases there cited, to which I shall refer.

The question in *The Secretary of State for India* v. *Bombay Landing and Shipping Co., Ld.* (3) was whether a judgment recovered by the Secretary of State was entitled to precedence over the claims of ordinary creditors who sought the benefit of a winding-up order. The Court held that the Crown was not, either expressly or even by implication, bound by the

(1) (1882) L. R. 9 Q. B. D. 648, 662. (2) (1884) L. R. 9 A. C. 434.
(3) (1868) 5 Bom. H. C. R. (O. C.) 23.

1917

BANK OF UPPER INDIA v. THE ADMINISTRATOR-GENERAL OF BENGAL.

CHAUDHURI J.

Indian Companies Act (X of 1866), inasmuch as that Act had not worked any alteration in the ownership in the property against which the Secretary of State sought execution. The ownership still remaining in the Company, the doctrine which prevailed in *Giles* v. *Grover* (1) was applied. *The King* v. *Cotton* (2) was referred to, and the following observation of Chief Baron Parker was cited with approval, viz: "that the property was not altered was the true reason" *Ganpat Putaya* v. *The Collector of Kanara* (3) merely decided that the Crown had the first claim for levying court-fees on the proceeds of a pauper suit. *Puthia Valappil Barga* v. *Veloth Assenar* (4) decided that in as much as the stamp fees recoverable by the Government in connection with a pauper suit was a first charge under section 411 of the Civil Procedure Code, the purchase of property sold to recover the amount due to the Government prevailed against the subsequent purchase of the same property sold in execution of any other decree. In *Gayanada Bala Dassee* v. *Butto Kristo Bairagi* (5), the amount of court-fees was declared as the first charge on the premises in which the pauper plaintiff succeeded in getting her rights declared, and Sale J. decided that inasmuch as the Crown had the prerogative of precedence, it was not necessary for the Crown to attach the fund in Court which represented the proceeds of the property sold. These cases do not directly deal with the question now before me and do not appear to me to support the passage cited from Dr. Ghose. Sale J. relied upon *The Collector of Moradabad* v. *Muhammad Daim* (6) where it was held that the principle that the Government took precedence of all other

(1) (1832) 9 Bing. 128.
(2) (1751) Parker 112.
(3) (1875) I. L. R. 1 Bom. 7.
(4) (1902) I. L. R. 25 Mad. 733.
(5) (1906) I. L. R. 33 Calc. 1040.
(6) (1879) I. L. R. 2 All. 196.

creditors is not liable to exception in the case of lien-holders, upon the strength of *Ganpat Putaya* v. *The Collector of Kanara* (1) above referred to, which does not appear to me to support the principle enunciated by the Allahabad Court in *The Collector of Moradabad* v. *Muhammad Daim* (2) which has now been expressly overruled by a Full Bench of that Court: see *Dost Muhammad Khan* v. *Maniram* (3). I find Stanley C.J. took the same view of the Bombay case and said, "I am at a loss to see how the Government's claim in respect of the court-fee in such a case can be properly satisfied out of the property of the mortgagee who is in no way liable for its payment. The court-fee is no doubt a first charge upon the interest of the mortgagor, but before the mortgagor is entitled to any benefit from the property mortgaged he must satisfy the subsisting mortgage. The question of the precedence of a Crown debt over private hypothecation debts was discussed in *Rama Chandra* v. *Pitchai Kanni* (4). The learned Judges in that case were not prepared to accept *The Collector of Moradabad* v. *Muhammad Daim* (2) and said they hesitated to import into places outside the Presidency towns the doctrine of the common law of England relating to Crown debts." They held that the right of Government to priority to a mortgagee was not recognised in the mofussil, was shown by the express language of the Act which declared the land revenue to be a first charge on the land—an unnecessary provision—if by common law every debt due to the Crown was a first charge on the land. This case has been followed in *Ibrahim Khan Sahib* v. *Rangasami Naicken* (5). The Madras cases arose out of sales for

(1) (1875) I. L. R. 1 Bom. 7.
(2) (1879) I. L. R. 2 All. 196.
(3) (1907) I. L. R. 29 All. 537.
(4) (1883) I. L. R. 7 Mad. 434.
(5) (1905) I. L. R. 28 Mad. 420.

1917

BANK OF UPPER INDIA v. THE ADMINISTRATOR-GENERAL OF BENGAL.

CHAUDHURI J.

Akbari revenue, and in the last case I have referred to, the learned Judges held that the sale did not affect a mortgage which had been created prior to the sale. In some of the cases above referred to, a view seems to have been taken that the law relating to the priority of Crown debts in a Presidency town where the common law of England may be applied, is different from the law applicable to the mofussil.

The English law relating to the matter is summed up in Coote on Mortgages, 8th edition, pp. 1386—1388. It says that a mortgagee is liable to have his security postponed to certain claims of the Crown which, by virtue of its prerogative, has the right to issue an "extent" or execution against all the lands of its debtors, except copyholds, and to follow such lands into the hands of subsequent mortgagees or purchasers, though without notice. The Crown claiming under an "extent" is like a judgment creditor, subject to prior equities and to such encumbrances as the debtor has lawfully created. Not only all interests actually created by the debtor before the lien of the Crown has attached, but also the conditions to which the lands have been subjected prior to the date of such lien are binding upon the Crown.

The question in England does not now depend merely upon the common law, which has been largely modified by special Statutes. There is no general priority in all cases for Crown debts over the debts of the subject. The matter before me is a matter solely of the administration of assets under the direction of the Court. In such a case it has been held by James L. J. in *Re Henley & Co.* (1), that whenever the right of the Crown and the right of the subject with respect to payment of a debt of equal degree come into competition, the Crown right prevails. It

(1) (1878) L. R. 9 Ch. D. 469, 481.

was held that the Crown having a right of distress, which was not taken away by the Companies Act of 1862, could proceed to distress, and it was therefore right that the Crown debt should be paid in priority to the other creditors. Cotton L. J. held that this right existed even when the Crown submitted to come in under the administration of the assets in the winding up of the Company. A distinction has always been drawn between a bankruptcy and winding up, inasmuch as in the former, the whole of the property is divested from the bankrupt and passes to the trustee and becomes his property, while in the case of winding-up there is no such divestment. The decision of the Court of Appeal in *Re Henley & Co.* (1) rested upon both grounds, namely, that the property had not passed out of the Company, and also on the right of the Crown to be paid in priority to all other creditors of equal degree. This case was considered in *New South Wales Taxation Commissioners* v. *Palmer* (2). In England it has been held that if for any reason the Crown loses its prerogative remedies, such as extent, or does not choose to avail itself of them, it can still come in and claim priority of payment in administration by virtue of "the incontrovertible rule of law that *where the King's and the subjects' title concur*, the King's shall be preferred": *Rex* v. *Wells* (3). Except so far as the Legislature has thought fit to interfere with it, this rule appears to be one of universal application. In the present case there is no question of divesting, because the assets are in the hands of the Administrator-General as Receiver. The question, so far as we are concerned, depends upon section 49 of the Presidency Towns Insolvency Act. The position of secured creditors

(1) (1878) L. R. 9 Ch. D. 469. (2) [1907] A. C. 179.
(3) (1812) 16 East 278. 282.

1917

BANK OF UPPER INDIA v. THE ADMINISTRATOR-GENERAL OF BENGAL.

CHAUDHURI J.

in that Act is different from that of unsecured creditors, see section 12, cl. (*2*). A secured creditor may not petition for adjudication of an insolvent unless he is willing to relinquish his security for the benefit of the general body of creditors, or gives an estimate of the value of his security, and in the latter case he may be admitted as a petitioning creditor to the extent of the balance of the debt due to him after deducting the value so estimated. Schedule II of that Act provides for the proof of debts by secured and other creditors. Clauses 9 to 16 are the rules applicable to the former. A secured creditor may realise his security, or choose to surrender it to the Official Assignee and may prove for the balance. These rules are the same as under the English Bankruptcy Act, 1883.

The mortgages in favour of the Alliance Bank and the Delhi and London Bank are English mortgages. In such mortgages the ownership is wholly transferred to the creditor, which is, however, liable to be divested by the repayment of the loan on the appointed day. The mortgagees have the right to enter upon possession of the property immediately upon execution of the deed, but the possession of the mortgagor is protected by a covenant for quiet enjoyment till default. The mortgagor has only the right to redeem. The mortgagee is not obliged to apply for sale of the property mortgaged under rule 18 of the Presidency Towns Insolvency Act. He has no debt proveable in the Insolvency until his security has been valued or realised. It stands outside the bankruptcy. I, therefore, hold that the Crown is not entitled to priority over the immoveable properties so mortgaged. In this I am supported by *Dost Muhammad Khan* v. *Maniram* (1) and *Ibrahim Khan Sahib* v. *Rangasami Naicken* (2). The general rule is that unless a contrary

(1) (1907) I. L. R. 29 All. 537. (2) (1905) I. L. R. 28 Mad 420.

intention is shown, a mortgage of land or buildings passes the right to the fixtures then upon the premises, and fixtures attached by the mortgagor to the property after the date of the mortgage will also, except under an agreement to the contrary, pass to the mortgagee.

In respect of the mortgages, the Alliance Bank ranks first. The second mortgagee has a right to redeem, so has the Official Assignee on behalf of the insolvent debtor. The ownership of the property passes to the first mortgagee in an English mortgage, but not to the puisne mortgagee. I, therefore, hold that he is not entitled to priority over the Crown.

The next question is as to the shares. The Alliance Bank claims paramount title to certain of their own shares registered in the name of the deceased which were not mortgaged to them. The claim arises upon clause 35 of their Articles of Association. I do not think this article affects the right of the Crown. In *Harrold* v. *Plenty* (1), the deposit of a certificate of shares as security for a debt was held to create an equitable mortgage, or, in other words, an agreement to execute a transfer of the shares by way of mortgage. It was not treated as a pledge, on the ground that a share is a chose in action and the certificate is merely evidence of title. Shares merely deposited and not actually transferred do not seem to me to create a right in favour of the depositee superior to the right of the Crown. I hold the same in respect of what is claimed as the hypothecation of moveables.

J. C.

Attorneys for the Administrator-General: *Leslie & Hinds.*

Attorneys for the Alliance Bank: *Orr Dignam & Co.*

Attorney for the Punjab Government: *Government Solicitor.*

(1) [1901] 2 Ch. 314.

PRIVY COUNCIL.

P.C.*
1917

Oct. 30;
Nov. 1, 26.

METHARAM RAMRAKHIOMAL
v.
REWACHAND RAMRAKHIOMAL.

[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF SIND, AT KARACHI.]

Hindu Law—Joint family—Mitakshara Law—Gains obtained in business by member who had received an ordinary education at expense of the joint family—Gains of science or learning—Gains obtained by skill, mental ability and individual effort.

There is no authority in the Mitakshara for the contention that the gains made personally, and without the aid of the joint funds, by a member of a joint family who received an ordinary education suitable to his position as a member of the family to which he belonged, should in law be regarded as partible, and not as his self-acquired property.

The author of the Mitakshara must have been writing of education—"learning"—such as he knew it to be; and when he laid down that the gains obtained by one of the members of a joint family from an education received at the family expense should be partible, he could not have intended that such gains should include gains which were the result, not of the education received at the expense of the joint family but of the peculiar skill, mental abilities, and individual effort, in applying and improving such education, exercised by the member who had been so educated.

The question of whether a member of a joint family carried on his business personally for his own personal benefit, without detriment to the joint family funds, or carried on such business as a member of the joint family, for the benefit of the joint family, is a question of fact to be determined on the evidence.

APPEAL 120 of 1915 from an Appellate Decree (24th June 1910) of the Court of the Judicial Commissioner of Sind, which affirmed a decree (3rd April 1908) of a

* *Present*: LORD BUCKMASTER, SIR JOHN EDGE, SIR WALTER PHILLIMORE, BART, AND SIR LAWRENCE JENKINS.

single Judge of the same Court exercising jurisdiction as the District Court of Karachi.

The plaintiffs were the appellants to His Majesty in Council.

The facts of the case are fully stated in the judgment of their Lordships of the Judicial Committee.

The main question at issue in the litigation out of which this appeal has arisen is whether the property in suit was the separate property of one Shewaram Ramrakhiomal of which he had power to dispose by his will, dated 26th March 1899, or was the joint property of a Hindu joint family governed by Mitakshara law consisting of Shewaram and his brothers and nephews.

It was not disputed that the family was joint, but it is claimed that the property in suit was acquired by Shewaram by his own exertions, and without the assistance of the family or of family funds, that it consisted of his independent earnings, and the profits of a money-lending business carried on by him, and formed no part of the family estate.

The Trial Judge (one of the Additional Judicial Commissioners sitting as District Judge) held (except as to a dwelling-house built by Shewaram on the family site) that the property in suit was the self-acquired separate property of Shewaram; and the Court of the Judicial Commissioner (Mr. M. H. W. HAYWARD, Judicial Commissioner, and Mr. E. H. E. LEGGATT, Additional Judicial Commissioner) affirmed the decision of the Trial Judge.

On this appeal,

P. O. Lawrence, *K.C.*, and *E. B. Raikes*, for the appellants, contended that Shewaram having received at the expense of the joint family an education which might reasonably be assumed to have contributed

1917

METHARAM RAMRAKHIOMAL v. REWACHAND RAMRAKHIOMAL.

materially to his success in life, the property left by him should, in the absence of proof to the contrary, be held to have been acquired by the aid of joint family funds. A general education imparted at the expense of the joint family makes the "gains of learning" of the member who receives it liable to partition. The general rule that anything acquired by a man himself, "without detriment to the father's estate does not appertain to the co-heirs," is laid down in Chap. I, section 4, clause 1 of the Mitakshara in dealing with property not partible (clauses 1 to 11); the "gains of science" are impartible only if the science is acquired "without the use of the father's goods" (clause 6). Science in the vernacular is "vidya:" it meant knowledge of the Vedas, the only knowledge in those early times; and the only education. In clause 8 an illustration is given as to "science" acquired when receiving a foreign maintenance; gains so acquired are impartible. For the purpose of the appellant's contention "science" means any knowledge gained at the expense of the joint family. The Mayukha (Chap. IV, section 7, paragraphs 2, 4), is to the same effect as the Mitakshara [SIR LAWRENCE JENKINS:—The authority of the Mayukha only extended to the Island of Bombay and Gujerat. Sind had nothing to do with Gujerat.] The Courts held in some of the earlier cases that though "science" included general education, yet if a member of the family by special ability acquired excellence in any profession his gains from that would not be partible. Reference was made to *Chalakonda Alasani* v. *Chalakonda Ratnachalam* (1) which decided that the "ordinary gains of science are divisible when such science has been imparted at the family expense, and acquired while receiving a family maintenance"; but

(1) (1864) 2 Mad. H. C. 56, 78.

it is otherwise "where the science has been imparted at the expense of persons not members of the learner's family." That was the case of a dancing girl specially educated at the expense of the joint family for her profession: and it was held by the High Court (reversing the decision of the District Judge, who relied on the Sanskrit authorities to the effect that her gains were impartible) that the "gains of science" were joint property, having been imparted at the expense of the family. HOLLOWAY J. in that case made a distinction between ordinary and extraordinary gains (see p. 78 of the report). The Calcutta High Court in *Dhunookdharee Lall* v. *Gunput Lall* (1) came to a conclusion contrary to the Madras decision, and held that gains acquired by a member of a joint family were not necessarily joint because he had been educated at the family expense. The Bombay High Court in *Bai Mancha* v. *Narotamdas Kashidas* (2) followed the Madras decision of 1864: and a later decision by the Madras High Court in *Durvasulu Gangadharudu* v. *Durvasulu Narasammah* (3) was to the effect that the professional gains of a vakil, who had received a general education at the family expense, were joint property. The question was discussed by this Board in *Pauliem Valoo Chetty* v. *Pauliem Sooryah Chetty* (4), but was not decided; and since then the Courts in India had been reluctant to follow the earlier decisions which, it was submitted, were rightly decided. Four other cases followed:—*Boologam* v. *Swornam* (5), *Lakshman Mayaram* v. *Jamnabai* (6), where a distinction is for the first time drawn between special and general education: *Krishnaji Mohadev* v. *Moro*

(1) (1868) 11 B. L. R. 201 note; 10 Suth. W. R. 122.
(2) (1869) 6 Bom. H. C., A. C. 1.
(3) (1872) 7 Mad. H. C. 47, 50.
(4) (1877) I. L. R. 1 Mad. 252, 261; L. R. 4 I. A. 109, 113, 116.
(5) (1881) I. L. R. 4 Mad. 330.
(6) (1882) I. L. R. 6 Bom. 225.

1917

METHARAM RAM-RAKHIOMAL v. REWACHAND RAM-RAKHIOMAL.

Mohadev (1), and *Lachmin Kuar* v. *Debi Prasad* (2): all these four cases, it was contended, were wrongly decided; as the Judges deciding them did not adhere to the proper interpretation of the verses of the Mitakshara relating to the matter. The true meaning of "science" is that it is equivalent to ordinary knowledge, which was the view taken by the Courts before the decision of the Privy Council. The Government of India had a Bill drafted in 1891 which proposed to make the gains derived from education impartible, but it created so much sensation that it was not further proceeded with and never became an Act. The state of the law which that Bill was intended to alter is the law for which the appellants now contend. Mayne's Hindu Law deals with the matter in paragraph 283 of the 8th edition. The view he there propounds, so far as it deals with the interpretation of the Mitakshara Chap. I, 4, 8, is an innovation taken from the Dayabhaga which is out of place in dealing with the Mitakshara school of law. Mayne's observations are misrepresented in *Lakshman Mayaram* v. *Jamnabai* (3). In the present case Shewaram received a better education than his elder brother, as also did the younger brothers.

As to the agreement by Shewaram to put all his property into the joint funds, such an arrangement if invalid as a contract, there being no consideration, might be effective as a compromise. That took place before the cases cited here were decided; and Shewaram never asserted that his savings were self-acquired until 1888.

[Their Lordships intimated that they did not wish to hear arguments for the respondents, but would be glad if the respondents' counsel could refer them to any other authorities on the question under discussion.]

(1) (1890) I. L. R. 15 Bom. 32. (2) (1897) I. L. R. 20 All. 435.
(3) (1882) I. L. R. 6 Bom. 225.

De Gruyther, K. C., (*C. O'Gorman* with him), for the respondents, referred to Sir Thomas Strange's Hindu Law. The Mitakshara, though a commentary on the law, must, as regards the people to whom it applies, be recognised and treated as being the law. The texts relating to the question for decision are referred to in Mr. Collett's judgment in *Chalakonda Alasani* v. *Chalakonda Ratnachalam* (1). In Manu Chap. IX, slokas 206, 208 there cited "without using the patrimony" means not using the family property in the exercise of the profession. The same meaning is intended by the expression "to the detriment of the family estate," in Mitakshara, Chap. I, section 4, paragraphs 10, 11. This is made clear in Strange's Hindu Law at page 213, where it is stated that "the essence of the exclusive title consists in its having been made by the sole agency of the individual, without employing for the purpose what belongs in common to the family." Strange adds, at page 215, "that the acquisition vests in the family only if the common fund has been *directly* instrumental." He gives as his authority certain passages in the Dayabhaga; but on the general question whether property is joint or self-acquired, there is no distinction between the two schools of law. These passages of the Mitakshara have also been translated by Sir W. Jones who translates as "learning," what Colebrooke renders as "science".

P. O. Lawrence, K. C., referred to *Durga Dat Joshi* v. *Ganesh Dat Joshi* (2).

Nov. 26.

The judgment of their Lordships was delivered by

SIR JOHN EDGE. This is an appeal from a decree, dated the 24th June 1910, of the Court of the Judicial Commissioner of Sind, which confirmed a decree, dated

(1) (1864) 2 Mad. H. C. 56, 59. (2) (1910) I. L. R. 32 All. 305.

1917

METHARAM RAMRAKHIOMAL v. REWACHAND RAMRAKHIOMAL.

the 3rd April 1908, of a single Judge of that Court exercising jurisdiction as the District Court of Karachi.

The suit in which this appeal has arisen was brought in the Court of the District of Karachi on the 26th May 1905, by the appellants here to obtain a declaration that the property which one Shewaram purported to devise by his will and a codicil was the joint family property of Shewaram, the plaintiffs and some of the defendants, and that the will and codicil were inoperative to pass any title to the property. Other reliefs were claimed, to which it is not necessary to refer. The executors of the will were amongst the defendants to the suit.

Shewaram died on the 27th May 1899. He had been and was at the time of his death a member of a joint Hindu family, which was governed by the law of the Mitakshara. The plaintiffs were members of the same joint family. The question in the suit was whether the property of which Shewaram purported by his will and codicil to dispose was property of the joint family or was property self-acquired by Shewaram which had not been thrown by him into the joint stock of the family property.

The plaintiffs, Metharam, Shewaram, and the defendants, Rewachand and Hermandas, were sons of one Seth Ramrakhiomal Jethanand, and they and others, parties to this suit, constituted a joint Hindu family. The family business was that of money-lending, and was carried on at Karachi, Seth Ramrakhiomal being, until his death in 1884, the manager. On his death the money-lending business of the family was continued, and was carried on under the management of the plaintiff Metharam, who was the eldest son. Shewaram, who was the second son, was born in or about 1847. He was educated at the expense of

the joint family at the Government School at Karachi, which in the evidence is referred to as a High School. At that school Shewaram learned to speak and to write English. When he was 22 years old he became a pleader's clerk. He continued to be a pleader's clerk until 1878, when he entered the employment of Messrs. Volkart Brothers. He was subsequently in the employment of Messrs. Rose and Co., and in October 1881 he entered the employment of the firm of Charles Forbes and Co., as their head broker. With the latter firm he continued until he died in 1899. It may be assumed that the knowledge of English which Shewaram acquired at the Government school was of use to him as a pleader's clerk and in the other employments in which he was subsequently engaged. From the savings out of his salaries and brokerage, and from the profits which he derived from a money-lending business which he personally carried on, he acquired a fortune of about 2 lakhs and 50,000 rupees, which is represented by the property of which he purported to dispose by his will and codicil. The money-lending business which Shewaram personally carried on was started by him with capital derived from the savings out of his salary as a pleader's clerk, and without the aid of the joint fund.

In the plaint it was in effect alleged that the property of which Shewaram purported by his will and codicil to dispose had been acquired by him as a member of the joint family, and was joint family property of which he could not dispose by will, and alternatively that Shewaram had thrown his self-acquired property into the common stock with the intention that it should be treated as joint and not self-acquired property. In the written statements of the executors it was alleged that the property of which Shewaram had by his will and codicil disposed was

1917

METHARAM RAMRAKHIOMAL v. REWACHAND RAMRAKHIOMAL.

his self-acquired property, and it was denied that Shewaram had thrown his self-acquired property into the common stock of the family. The learned Trial Judge fixed the following amongst other issues which are now immaterial :—

(2) Did Shewaram acquire the property in suit with the assistance of joint family funds ?

(3) If not, did Shewaram join the property to the common ancestral property ?

Those issues were agreed to by the parties. No issue was suggested or fixed as to the education which Shewaram had obtained, nor was it contended before the Trial Judge that the property in question had been acquired by Shewaram by means of any special or other education. The Trial Judge, having stated in his judgment that the evidence in the case " covers nearly every year of Shewaram's active life, and details every incident from which an inference can be extorted that Shewaram's property was the property of the family," considered the evidence fully and in detail, and found the second and third issues in the negative, and dismissed the suit. The plaintiffs appealed to the Court of the Commissioner, and in their grounds of appeal did not suggest that the education which Shewaram had received at the expense of the joint family had been such as to entitle the joint family to the gains made by him as a pleader's clerk or in his subsequent employments, or as a money-lender. When, however, the appeal came on for hearing in the Court of the Commissioner the learned counsel who appeared for the plaintiff appellants contended, amongst other things, that it had been proved that Shewaram had obtained the posts from which he had derived his salary and brokerage, through the general education which he had received from the joint family funds.

There is no evidence on the record to show what was the nature of the education which Shewaram received at the school at Karachi. Had the plaintiffs been in a position to prove that his education had been of an exceptionally high standard and more expensive than the education which ordinarily would be provided for a member of such a family as he belonged to, they could have raised an issue on that subject and have called evidence in support of it. The learned Judges who heard the appeal considered that the English education received at the Government school at Karachi could not be regarded, for a well-to-do family, as more than a general education, and certainly was not a special education comparable with special training for the Bar or the Civil Service, and they concurred with all the material findings of fact of the Trial Judge, and by their decree dismissed the appeal. From that decree this appeal has been brought.

In this appeal it has been contended on behalf of the plaintiffs that in arriving at their findings on the second and third issues, the Courts below have misconstrued a document in writing. The document referred to was a letter which was written by Shewaram to his brother Metharam, and was as follows:—

"My dear brother,

"I am ready to join my property with the family property, and take my share from it.

SHEWARAM.

"Dated 1st October, 1888."

The Trial Judge construed that letter as a conditional offer. "If you will come to partition I shall join my fund to yours"; implying "If you don't come to partition, I shall not join them."

The plaintiffs endeavoured to prove by oral evidence that Metharam had asked Shewaram for a chit

1917

METHARAM RAM-RAKHIOMAL v. REWACHAND RAM-RAKHIOMAL.

showing that the joint family fund and Shewaram's self-acquired fund were liable to be partitioned as a joint family fund, and that thereupon Shewaram wrote the letter of the 1st October 1888. That story rested solely on the evidence of Metharam and Rewachand, and the Trial Judge entirely disbelieved it. The Judges who heard the appeal construed the letter as an offer made by Shewaram during negotiations for partition, and found that the offer was never accepted. The Courts below rightly construed the letter. In their Lordships' opinion, Shewaram's letter affords strong evidence that on the 1st October, 1888, his contention was that the property which he had acquired was his self-acquired property, and was not the property of the joint family. If Shewaram had, before the 1st October, 1888, thrown his self-acquired property into the joint family fund there was no object in his writing the letter to Metharam, who was the manager for the joint family. In neither of the Courts below did the Judges misconstrue the letter of the 1st October 1888; and the plaintiffs are concluded, so far as conclusions of fact to be drawn from the evidence are concerned, by the concurrent findings of fact of those Courts that the property in suit was the self-acquired property of Shewaram, and that Shewaram did not join his self-acquired property to the joint family property.

It has, however, been contended on behalf of the plaintiffs that as Shewaram had received an education in English at the school at Karachi at the expense of the joint family, the property which he acquired must be attributed to that education, and must in law be held to be the joint property of the joint family. That contention depends upon the interpretation of texts of the Mitakshara, which are to be found in section 4, chapter 1. Section 4 deals with effects which

are not liable to partition. Those texts of the Mitakshara translated by Mr. Colebrooke are as follows:—

"1. The author explains what may not be divided, 'whatever else is acquired by the co-parcener himself, without detriment to the father's estate, as a present from a friend, or a gift at nuptials, does not appertain to the co-heirs. Nor shall he who recovers hereditary property, which had been taken away, give it up to the parceners; nor what has been gained by science.'

5. He need not give up to the co-heirs what has been gained by him through science, by reading the scriptures, or by expounding their meaning; the acquirer shall retain such gains.

6. Here the phrase 'anything acquired by himself without detriment to the father's estate,' must be everywhere understood; and it is thus connected with each member of the sentence; what is obtained from a friend, without detriment to the paternal estate; what is received in marriage, without waste of the patrimony; what is redeemed of the hereditary estate, without expenditure of ancestral property; what is gained by science without use of the father's goods. Consequently, what is obtained from a friend, as the return of an obligation conferred at the charge of the patrimony; what is received at a marriage concluded in the form termed Asura or the like; what is recovered of the hereditary estate by the expenditure of the father's goods; what is earned by science acquired at the expense of ancestral wealth; all that must be shared with the whole of the brethren and with the father."

The Sanskrit word which Mr. Colebrooke translated as "science", was translated by Sir William Jones as "learning."

The earliest case, to which their Lordships have been referred, decided in India on the meaning of those texts of the Mitakshara was *Chalakonda Alasani* v. *Chalakonda Ratnachalam* (1). That case was decided by the High Court of Madras in 1864. It was a very peculiar case. The plaintiff and the two defendants were dancing girls and constituted a Hindu joint family. The first defendant was the plaintiff's adopted daughter, the second defendant was the plaintiff's natural daughter. The plaintiff brought the suit to obtain possession, as the manager of the joint family,

(1) (1864) 2 Mad. H. C. 56.

1917

METHARAM RAM-RAKHIOMAL v. REWACHAND RAM-RAKHIOMAL.

of gold and silver jewels and other personal property which represented gains of the first defendant in her calling of a dancing girl, she also claimed certain household utensils and some other minor articles. The plaintiff had spent a considerable amount of money in educating the first defendant in singing and dancing.

Mr. Collett, who, as the Civil Judge of Vizagapatam, tried the suit, having in a learned judgment considered several Sanskrit texts, as translated, including the texts of the Mitakshara, Manu, Yajnavalkya, Narada, and the Dayabhaga and the works of some modern writers on Hindu law, said :—

"I am sure I am laying down an equitable rule, and I believe also the rule most consistent with the weight of authority. There is no doubt some conflict of opinion ; but I think that the true position is that the mere fact of a Hindu having received a professional education at the expense of his family, as for instance from his father, does not render all his subsequent professional earnings liable to be divided with his brothers. I believe that on a due consideration of the authorities the rule of law is not really different in respect to property acquired by learning to what it is in respect to property acquired by agriculture or by trade. The test is the substantial use of joint property during and for the purpose of the acquisition, if there is none such, then the acquisition does not become joint property."

Mr. Collett made a decree in favour of the defendants with the exception of the house-utensils and some other minor articles. From that decree the plaintiff appealed to the High Court of Madras. Phillips and Hollway JJ. in their judgment in the appeal, said :—

"We are constrained to say that we feel bound by authority to hold that the gains, at all events the ordinary gains, of learning and science which have been taught at the expense of the family funds, are not impartible. To render them so the science or learning must have been imparted by persons not members of the learner's family."

and they allowed the appeal.

In *Dhunookdharee Lall* v. *Gunput Lall* (1) which was decided by the High Court of Bengal in 1868, the

(1) (1868) 11 B. L. R. 201 note ; 10 Suth. W. R. 122.

defendant proved that in acquiring the property, which was alleged to be joint property, he did not use any of the property which belonged to the joint family, and L. S. Jackson and Dwarkanath Mitter JJ. in appeal dismissed the suit Dwarkanath Mitter J. added :—

"His (the plaintiff's) case in the Court below was that the defendant received his education from the joint estate, and that he is consequently entitled to participate in every property that has been acquired by the defendant by the aid of such education. But this contention is nowhere sanctioned by the Hindu law, and I see nothing in justice to recommend it."

In *Bai Mancha* v. *Narotamdas Kashidas* (1) which was decided by the High Court of Bombay in 1869, one Jamnadas, a deceased member of a joint Hindu family, had made money as a vakil and as a moneylender, and it was held by Couch, C.J., and Newton, J., that the onus of proving that the property so acquired by Jamnadas was his self-acquired property was upon the party alleging that it had been self-acquired. Those learned Judges approved of the judgment of the High Court of Madras in *Chalakonda Alasani* v. *Chalakonda Ratnachalam* (2).

In *Durvasulu Gangadharudu* v. *Durvasulu Narasammah* (3) which was decided by the High Court of Madras in 1872, it was proved that a vakil had received from his father nothing more than a general education, and it does not appear that the vakil was distinguished by his professional learning. Kindersley, J., considered that the fair presumption was that such attainments as the vakil possessed had been acquired with the assistance of the family means, and that presumption not having been rebutted by evidence of the acquisition of such attainments without such assistance, he held that the professional earnings of the vakil was subject to partition. The judgment

(1) (1869) 6 Bom. H. C. A. C. 1. (2) (1864) 2 Mad. H. C. 56.
(3) (1872) 7 Mad. H. C. 47.

1917

METHARAM RAMRAKHIOMAL v. REWACHAND RAMRAKHIOMAL.

of Kindersley J. suggests that he considered that if the professional gains of the vakil had not been merely the result of the general education which he had received at the expense of the joint family to which he belonged, but had been the result of much legal learning or skill, his professional gains would have been his self-acquired property. Holloway J. entertained no doubt that the fund representing the professional earnings of the vakil was partible, and expressed his full adherence to the judgment of the High Court of Madras in *Chalakonda Alasani* v. *Chalakonda Ratnachalam* (1) and especially to the statement in that case, that the ordinary gains of science by one who has received a family maintenance are certainly partible, and concluded his judgment by observing, "I do not believe, moreover, that within the meaning of the authorities the vakil's business is matter of science at all." Apparently, Holloway J. regarded the learning in the law required by a vakil of his day as inferior to the science necessary to her success in her line of life of an Indian dancing girl.

In *Pauliem Valoo Chetty* v. *Pauliem Sooryah Chetty* (2), which came before this Board in 1877, the Board, on the evidence, found that the son had not been educated by means of any joint fund of the family, but out of the separate estate of his father, over which the father had an absolute power of disposition. In that case the Mitakshara, chapter 1, sections 4, 6, 7 and 8, and the decisions in *Chalakonda Alasani* v. *Chalakonda Ratnachalam* (3), *Dhunookdharee Lall* v. *Gunput Lall* (4), *Bai Manchha* v. *Narotamdas Kashidas* (5), and *Durvasulu Gangadharudu* v.

(1) (1864) 2 Mad. H. C. 56.
(2) (1877) I. L. R. 1 Mad. 252; L. R. 4 I. A. 169.
(3) (1864) 2 Mad. H. C. 56.
(4) (1868) 11 B. L. R. 201 note; 10 Suth. W. R. 122.
(5) (1869) 6 Bom. H. C., A. C., 1.

Durvasulu Narasammah (1) were referred to in argument before the Board, and their Lordships with reference to them observed—

"it does not become necessary to consider whether the somewhat startling proposition of law put forward by the appellant, which, stated in plain terms, amounts to this: that if a member of a joint Hindu family receives any education whatever from the joint funds, he becomes forever after incapable of acquiring by his own skill and industry any separate property, is or is not maintainable. Very strong and clear authority would be required to support such a proposition. For the reasons that they have given, it does not appear to them necessary to review the text-books or the authorities which have been cited on this subject. It may be enough to say that, according to their Lordships' view, no texts which have been cited go to the full extent of the proposition which has been contended for. It appears to them, further, that the case reported in the tenth volume of *Sutherland's* 'Weekly Reporter,' in which a judgment was given by Mr. Justice Jackson and Mr. Justice Mitter, both very high authorities, lays down the law bearing upon this subject by no means so broadly as it is laid down in two cases which have been quoted as decided in *Madras* the first being to the effect that a woman adopting a dancing girl and supplying her with some means of carrying on her profession was entitled to share in her gains; and the second, to the effect that the gains of a vakil who has received no special education for his profession are to be shared in by the joint family of which he is a member; decisions which have been to a certain extent also acted upon in *Bombay*. It may hereafter possibly become necessary for this Board to consider whether or not the more limited and guarded expression of the law upon this subject of the Courts of *Bengal* is not more correct than what appears to be the doctrine of the Courts of *Madras*."

That intimation appears to have had its effect upon Courts in India.

In *Boologam* v. *Swornam* (2), which was decided in 1881, Innes and Kernan JJ., on the evidence, having found that the earnings of the dancing girls, who had received an ordinary education sufficient to fit them to earn a living as dancing girls, were acquired by them without detriment to the family estate and without any scientific acquirements which had been imparted

(1) (1872) 7 Mad. H. C. 47. (2) (1881) I. L. R. 4 Mad. 330.

1917

METHARAM RAM-RAKHIOMAL v. REWACHAND RAM-RAKHIOMAL.

by the aid of the family funds, held that the earnings of the girls were their self-acquired property.

In *Lakshman Mayaram* v. *Jamnabai* (1) which was decided in 1882, Melvill and Kemball, JJ., who considered that the dictum of Mitter J. in *Dhunookdharee Lall* v. *Gunput Lall* (2), that the Hindu law nowhere sanctions the contention that acquisition of a member of a Hindu family who has received education is liable to partition, is not strictly accurate, held that when the Hindu texts "speak of the gains of science which has been imparted at the family expense, they intend the special branch of science which is the immediate source of the gains, and not the elementary education which is the stepping stone of all science," and consequently that the property which was acquired by a Subordinate Judge who had received a mere elementary education at the family expense, but had obtained in a lawyer's office and in the Sadar Adalat that knowledge of law and judicial practice which had qualified him for the post of a Judge, was his self-acquired property and was impartible.

In *Krishnaji Mahadev* v. *Moro Mahadev* (3) which was decided in 1890, Birdwood and Candy JJ. held that the gains made as *karkuns* by two members of a joint Hindu family, who had received only a rudimentary education at the expense of the joint family, were their self-acquired property.

In *Lachmin Kuar* v. *Debi Prasad* (4) Burkitt and Dillon JJ. in 1897, approved of the decision in *Krishnaji Mahadev* v. *Moro Mahadev* (5) and following it held that the gains from employment in the Commissariat Department of a member of a joint Hindu

(1) (1882) I. L. R. 6 Bom., 225.
(2) (1868) 11 B. L. R. 201 note; 10 Suth. W. R. 122.
(3) (1890) I. L. R. 15 Bom. 32.
(4) (1897) I. L. R. 20 All. 435
(5) (1890) I. L. R. 15 Bom. 32.

family, who was not shown to have had any assistance from the joint family funds except his support in early years and the usual rudimentary education, were his self-acquired property.

With the exception of the cases to which they have referred, no case decided in India, or in which this Board has expressed an opinion on the question as to whether the gains of a member of a joint Hindu family, who had been educated at the expense of the joint family, are in law to be considered as his or her self-acquired property or as belonging to the joint family, has been brought to the attention of their Lordships.

Their Lordships will assume that the Sanskrit word used in the Mitakshara which Mr. Colebrooke translated as "science" means "learning." The latter apparently is the meaning of the word which has been generally accepted by the Courts in India. It gives the Sanskrit word a wider meaning than it would otherwise have. It would be difficult, if not impossible, to ascertain what could have been the science or sciences which the author of the Mitakshara, Vijnanesvara, who wrote his commentary in the latter part of the eleventh century, had in contemplation if he used a word which meant "science" strictly so called and is not susceptible of the wider and more comprehensive meaning "learning."

In construing the texts of the Mitakshara which their Lordships have quoted, it is necessary to bear in mind that education beyond that of a very elementary kind must have been limited to very few of the people for whose guidance the Mitakshara was written, and that for that limited few there could have been then no education attainable in the arts, sciences, and professions of that time comparable with the education now obtainable and necessary for a successful

1917

METHARAM RAM-RAKHIOMAL v. REWACHAND RAM-RAKHIOMAL.

career in the arts, sciences, and professions of the present day. It may be assumed that the author of the Mitakshara, who was construing and explaining the more ancient texts of the Hindu law for the benefit and guidance of the Hindu community, could not have intended to penalise an education which was not in his contemplation and of which necessarily he knew nothing. Nor can it be assumed that his intention was to penalise and discourage self-acquired skill, or the exercise of high mental abilities or great individual effort in winning success in an art, or science, or a profession. He must have been writing of education —learning—such as he knew it to be, and when he laid down that the gains obtained from an education received at the expense of a joint family should be partible, he could not have intended that such gains should include the gains which were the result, not of the education received at the expense of the joint family, but of the peculiar skill, mental abilities and individual effort in applying and improving such education exercised by the person who had been educated at the expense of the joint family. Their Lordships cannot find in the texts of the Mitakshara any authority for the contention in this case that the gains made as a clerk, as a broker, or as a money-lender, personally and without the aid of the joint funds by a member of a joint family who received an ordinary education suitable to his position as a member of the family to which he belonged, should in law be regarded as partible and not as his self-acquired property. The question of whether a man who happening to be a member of a joint family carried on his business, whatever it was, personally for his own personal benefit without detriment to the joint family fund, or carried on such business as a member of the joint family for the benefit of the joint family, is a question

of fact to be determined on the evidence. No inferences can be drawn from the fact that until Shewaram became a pleader's clerk he was maintained by the joint family funds. As a member of the joint family he was entitled to be maintained at the expense of the joint family, and to receive an ordinary education suitable to a person of his position, as was any other member of the family.

Their Lordships are of opinion that this appeal fails and should be dismissed with costs, and they will humbly advise His Majesty accordingly.

J. V. W. *Appeal dismissed.*

Solicitors for the appellants: *T. L. Wilson & Co.*

Solicitors for the respondents: *Drake Son & Parton.*

APPELLATE CIVIL.

Before Mookerjee and Walmsley JJ.

1917

May 22

MEHDI HOSSEIN

v.

UMESH CHANDRA MOOKERJEE*.

Chaukidari Chakaran Lands—Resumption—Putni lease—Transfer to landlord—Suit for recovery of possession with mesne profits—Village Chaukidari Act (Beng. VI of 1870) s. 51.

Where A obtained a putni of two villages from Z, paid a bonus and the annual rent was fixed in perpetuity, and where within the lands comprised in the putni were some chaukidari chakaran lands which were subsequently resumed by Government and transferred to Z, who settled the same with

*Appeals from Appellate Decrees, Nos. 2402, 2501 and 2502 of 1912, against the decrees of Asutosh Sarkar, Subordinate Judge of Birbhum, dated May 6, 1912, modifying the decrees of Girindra Nath Mookerjee, Munsif of Rampurhat, dated March 25, 1911.

1917

MEHDI HOSSEIN v. UMESH CHANDRA MOOKERJEE.

tenants, and where A, the putnidar, instituted a suit for declaration of title and recovery of possession with mesne profits :

Held, that, on equitable grounds, the putnidar and the zemindar must be placed in the position they would have occupied if the chaukidari chakaran lands had been resumed before the putni was created ; the assets of those lands would then have been taken into account in settling the amount of putni rent which would have represented the assessment due to the State, as also a fair share of the profit.

Held, also, that mesne profits were to be calculated on the basis of the rent payable by the tenants to the zemindar and not on that of the actual value of the land produce.

Ranjit Singh v. *Kali Dasi Debi* (1), *Kazi Newaz Khoda* v. *Ram Jadu Dey* (2), *Rajendra Nath Mukherjee* v. *Hira Lal Mukherjee* (3), *Gopendra Chandra Mitter* v. *Tara Prasanna Mukherjee* (4), *Harak Chand Babu* v. *Charu Chandra Singha* (5) referred to.

SECOND APPEAL by Khondkar Mehdi Hossein and others, the defendants.

The facts necessary for the purposes of this report are shortly these. On the 27th July 1866, the plaintiffs' predecessor in title obtained a putni of two villages from the zemindar defendants, paid a bonus of Rs. 1,000 for the lease, and the annual rent being fixed in perpetuity at Rs. 501. Some chaukidari chakaran lands at that time in the occupation of the chaukidars were included in the putni. These lands were resumed later by Government and transferred to the zemindar in or about 1898 under the Village Chaukidari Act, 1870. Thereafter the zemindar took possession of the same and settled them with tenants. The plaintiffs, who were the putnidars, instituted this suit on the 11th June 1910, for declaration of their title and for recovery of possession with mesne profits. On the 15th March 1911, the Court of first instance decreed possession and held, (i) that the plaintiffs had

(1) (1917) 21 C. W. N. 609.
(2) (1906) I. L. R 34 Calc. 109.
(3) (1910) 14 C. W. N. 995.
(4) (1910) 14 C. W. N. 1049.
(5) (1910) 15 C. W. N. 5.

to pay to the zemindar the amount assessed under the Village Chaukidari Act, 1870, as well as a portion of the profits of the lands in dispute; (ii) that the rent payable by the tenants to the zemindar was the measure of damages recoverable by the plaintiffs. On appeal, the lower Appellate Court, on the 6th May 1912, varied the decree holding (*a*) that the plaintiffs were not liable to pay anything beyond the sum assessed at the time of the resumption as payable to the chaukidari fund, (*b*) that the plaintiffs were entitled to the actual value of the produce of the land in suit.

From that decision the defendants preferred this second appeal to the High Court.

Babu Ram Chandra Mazumdar and *Babu Nogendra Nath Sen*, for the appellants.

Babu Brojendra Nath Chatterjee, for the respondents.

MOOKERJEE AND WALMSLEY JJ. This is an appeal by the defendants in a suit for recovery of possession of land with mesne profits. On the 27th July 1866, the plaintiffs obtained a putni of two villages from the zemindar defendants. A bonus of Rs. 1,000 was paid for this lease and the annual rent was fixed in perpetuity at Rs. 501. Within the ambit of the lands comprised in the putni lease, there were chaukidari chakaran lands, at that time in the occupation of chaukidars. These lands were subsequently resumed by the Government and transferred to the zemindars, in conformity with the provisions of the Village Chaukidars Act, 1870. The zemindar took possession of the lands and settled them with tenants. The plaintiffs, who were putnidars, thereupon instituted this suit on the 11th June 1910, for declaration of their title and for recovery of possession with mesne profits. The Courts below have concurrently made a decree in

1917

MEHDI HOSSEIN v. UMESH CHANDRA MOOKERJEE.

their favour; but the two Courts have disagreed as to the terms under which the plaintiffs are entitled to hold this land as part and parcel of their putni under the zemindars. The Court of first instance held that the plaintiffs were under an obligation to pay to the zemindars, not only the sum assessed under the Village Chaukidars Act, 1870, at the time of resumption, but also a share of the profits of the lands they claim to recover. On appeal, the Subordinate Judge has held that the plaintiffs are liable to pay to the zemindars nothing beyond the sum assessed at the time of resumption as payable into the chaukidari fund. Upon the question of mesne profits also, the two Courts have disagreed. The trial Court held that the rent payable by the tenants settled on the lands by the zemindars was the measure of damages recoverable by the plaintiffs. The Subordinate Judge, on the other hand, has held that the plaintiffs are entitled to the value of the actual produce of the lands in suit. The zemindars have appealed to this Court and have raised only those two questions whereon the Courts below have disagreed; they have not disputed the right of the plaintiffs to recover possession of the lands; and it may be added that in view of the decision of the Judicial Committee in the case of *Raja Ranjit Singh* v. *Srimati Kali Dasi Debi* (1), the decree for possession cannot possibly be successfully challenged.

As regards the first question, namely, the terms under which the plaintiffs are entitled to recover possession of these lands from the zemindars and the tenants inducted by them into the land, we are of opinion that the view taken by the Subordinate Judge is erroneous. It was pointed out by this Court in the case of *Kazi Newaz Khoda* v. *Ram Jadu Dey* (2), that

(1) (1917) 21 C. W. N. 609.

(2) (1906) I L. R. 34 Calc. 109; 11 C. W. N. 201.

if in assessing the putni rent, the profits of all the lands including the chakaran lands were fully taken into account, the putnidar would not be liable to pay additional rent for the chakaran lands when they came into his possession; but otherwise the putnidar is bound to pay to the zemindar, in addition to the fresh amount assessed on resumption, a fair share of the profits derivable from the land. This view has been subsequently approved in the cases of *Rajendra Nath Mukherjee* v. *Hira Lal Mukherjee* (1), *Gopendra Chandra Mitter* v. *Tara Prasanna Mukherjee* (2) and *Harak Chand Babu* v. *Charu Chandra Singha* (3). In the first of these cases, Brett J. pointed out that it was not correct to hold as a general principle of law that the putnidar is not bound to pay to the zemindar more than the assessment made by the Collector; the zemindar would be equitably entitled, not only to payment of the assessment made by the Collector, but also a proportionate share in the profits such as the zemindar would, in the circumstances, be entitled to impose on the putnidar. We are of opinion that this view is unquestionably sound on principle. In the case before us, there is no indication in the contract between the parties that, at the time of inception of the grant the putni rent was assessed on the basis of the assets of all the lands situated within the ambit of the putni, inclusive of the chaukidari chakaran lands. It is, on the other hand, plain that the rent hitherto paid by the plaintiffs to the defendants has not represented the profits derivable from the chaukidari chakaran lands. Consequently, the terms of the contract between the parties do not entitle the plaintiffs to claim possession of the lands in suit from the zemindars, merely on payment of the sum now assessed

(1) (1910) 14 C. W. N. 995. (2) (1910) 14 C. W. N. 1049.
(3) (1910) 15 C. W. N. 5; 13 C. L. J. 102.

1917

MEHDI HOSSEIN v. UMESH CHANDRA MOOKERJEE.

by the revenue authorities under the Village Chaukidars Act, 1870.

Reliance has been placed by the plaintiffs respondents, upon the provisions of section 51 of the Village Chaukidars Act, which, however, do not really advance their contention. Section 51 provides that the land resumed by the Collector is transferred to the zemindar, subject to the prior contracts made by him The effect of the application of that principle to the case before us is that the plaintiffs can, under the terms of the putni lease, recover possession of the lands in suit. But the contract does not show that the plaintiffs are entitled to such possession without payment of any rent to the zemindar or without payment of any sum beyond what represents the new assessment. Consequently, on equitable grounds, the putnidar and the zamindar must be placed in the position they would have occupied, if the chaukidari chakaran lands had been resumed before the putni was created; the assets of those lands would then have been taken into account in settling the amount of putni rent, which would have represented the assessment due to the State as also a fair share of the profit. In these circumstances, we are of opinion that the order of the Court of first instance was just and proper and should not have been varied by the Subordinate Judge.

As regards the second question, namely, the basis of calculation of mesne profits, it cannot be disputed that the plaintiffs as putnidars would have been entitled to possession of the lands through tenants; the measure of damages payable to them is consequently represented by the rent payable by the actual cultivators to the plaintiffs as putnidars. This was the view taken by the Court of first instance, and should not have been rejected by the lower Appellate Court.

1917

MEHDI HOSSEIN v. UMESH CHANDRA MOOKERJEE.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and that of the Court of first instance restored. The appellants are entitled to their costs in this Court, but there will be no order for costs before the Subordinate Judge.

This judgment will govern the other two cases, viz., S. A. 2501 and 2502 of 1912, in each of which a similar order will be drawn up.

L. R. *Appeals allowed.*

APPELLATE CIVIL.

Before Mookerjee and Walmsley JJ.

SERAFAT ALI

v.

ISSAN ALI.*

1917

May 22.

Contribution, suit for—Contract Act (IX of 1872) ss. 69, 70.

X, a mortgagee, obtained a decree against A, B and C as representatives in interest of his mortgagor. A satisfied the decree-holder in full, and instituted a suit for contribution against B and C for recovery of two-thirds of the money. B and C denied that A had any interest in the mortgaged property, and urged that his payment was voluntary. The Court of first instance found, on the evidence, that A had an interest in the property, but the lower Appellate Court dismissed the suit holding that A had none :

Held, that a payment in satisfaction of a decree, by a person who is a party to the decree and was bound thereby, was a payment made lawfully within the meaning of s. 70 of the Indian Contract Act.

Bindubashini Dasi v. *Harendralal Roy* (1), *Radha Madhub Samonta* v. *Sasti Ram Sen* (2) discussed.

* Appeal from Appellate Decree, No. 2587 of 1914, against the decree of Sarada Prasad Baksi, Subordinate Judge of Midnapore, dated June 4, 1914, reversing the decree of Nitai Charan Ghose, Munsif of Tamluk, dated Feb. 24, 1913.

(1) (1897) I. L. R. 25 Calc. 305. (2) (1899) I. L. R. 26 Calc. 826.

1917

SERAFAT ALI v. ISSAN ALI.

Desai Himat Singji v. *Bhavabhai Khayabhai* (1), *Jinnat Ali* v. *Fateh Ali Matbar* (2) distinguished.

SECOND APPEAL by Serafat Ali and another, the plaintiffs.

It is unnecessary to recapitulate for the purposes of this report the facts and circumstances which led to the execution of the mortgage deed, but suffice it to say that a mortgage decree was made against the plaintiffs Serafat, Etimali, Isu the defendant No. 1, and certain other defendants. The two plaintiffs satisfied the decree in full, and instituted a suit for contribution against Isu and the other defendants, for the recovery of two-thirds of the money.

The defendants contended that the plaintiffs had no interest in the mortgaged property, and that the payment made by them was voluntary. On the 29th August 1911, the Court of first instance overruled the contentions of the defendants and decreed the suit in favour of the plaintiffs. On appeal, the lower Appellate Court, on the 8th July 1912, set aside the decision of the Court of first instance and remanded the suit for retrial on the two following issues: (i) "Whether the plaintiffs have any interest in the mortgaged lands described in the plaint? If so, what is the extent of their interest?" (ii) "What amounts, if any, are the plaintiffs entitled to recover from defendant No. 1 by way of contribution?" On retrial, the Court below passed a decree against defendant No. 1 for one-third the amount of money, holding that his share was one-third; also that the plaintiffs had an interest in the mortgaged property and in the payment of the decree. On appeal, the lower Appellate Court on the 4th June 1914 set aside the decision of the Court below. From that decision

(1) (1880) I. L. R. 4 Bom. 643. (2) (1911) 13 C. L. J. 646; 15 C. W. N. 332.

the plaintiffs preferred this second appeal to the High Court.

Babu Dwarkanath Chakravarty and *Babu Manmatha Nath Roy*, for the appellants.

Babu Ram Chandra Majumdar and *Babu Manindra Nath Dutt*, for the respondents.

MOOKERJEE AND WALMSLEY JJ. This is an appeal by the plaintiffs in a suit for contribution. The facts material for the determination of the question of law raised before us, stripped of superfluous details, may be briefly stated. X, a mortgagee, sued A, B and C, as representatives in interest of his mortgagor, and obtained a decree. The decree was by consent as to two of these persons and was *ex parte* as regards the other. A thereafter satisfied the judgment debt in full. A now sues to recover two-thirds of the money paid by him from B and C. B and C deny that A had any interest in the mortgaged property and urge that the payment made by A must consequently be deemed voluntary. The Court of first instance, upon the evidence, came to the conclusion that A had an interest in the mortgaged property and was entitled to maintain the suit for contribution against B and C. Upon appeal, the Subordinate Judge has held that A had no interest in the property, and, in this view, he has dismissed the suit. The result is that though the decree for the sale of the mortgaged properties has been satisfied with the money of A, though B and C have reaped the benefit of that payment, they escape all liability. The question arises, whether this position is supported by legal principle.

Section 69 of the Indian Contract Act provides that a person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other.

1917

SERAFAT ALI v. ISSAN ALI.

There has been some divergence of judicial opinion [*Mathooranath* v. *Kristo Kumar* (1), *Futteh Ali* v. *Gunganath* (2), *Nawab Mir* v. *Partap* (3), *Swarnamoyee* v. *Hari Das* (4), *Manindra* v. *Jamahir* (5), *Jinnat* v. *Fateh* (6)] upon the question whether this section is applicable to suits for contribution properly so called, that is, suits where the plaintiff admits his liability to pay a portion of the money actually paid by him and claims to recover the balance from the defendant: *Motichand* v. *Bajrang* (7), *Joynarain* v. *Badri Das* (8), *Satya Bhusan* v. *Krishna Kali* (9), *Rajani* v. *Ram Nath* (10). But whether the section is or is not applicable to suits for contribution, it has never been disputed that it applies to suits where the plaintiff is, upon the facts found, entitled to recover the whole sum from the defendant on the ground that the same was in law payable by the latter. In the case before us, it has been found that the plaintiffs had no interest in the mortgaged properties, as was, indeed, the contention of the defendants. In this view, the plaintiffs would be entitled, if section 69 applies, to recover the whole sum from the defendants. They have, however, claimed to recover only a portion of that amount. There can be no serious doubt that the money paid by the plaintiffs was money which the defendants were bound by law to pay. The only question in controversy is, whether the plaintiffs were persons interested in the payment of that money.

The true meaning of the expression "interested in the payment of money" has formed the subject of

(1) (1878) I. L. R. 4 Calc. 369.
(2) (1881) I. L. R. 8 Calc. 113.
(3) (1880) I. L. R 6 Bom. 244.
(4) (1902) 6 C. W. N. 903
(5) (1905) I. L. R. 32 Calc. 643.
(6) (1911) 13 C. L. J. 646; 15 C. W. N. 332.
(7) (1911) 16 C. L. J. 148.
(8) (1911) 16 C. L. J. 156.
(9) (1914) 20 C. L. J. 196.
(10) (1914) 20 C. L. J. 200.

judicial discussion in recent years, and in the case of *Pankhabati* v. *Nani Lal* (1), it was ruled that the words "interested in the payment of money which another is bound by law to pay" were comprehensive enough to include the cases of persons who were under apprehension of any kind of loss or inconvenience and were not restricted to cases of individuals who were sure to suffer actual detriment capable of assessment in money. On this principle it was ruled in the cases of *Bindubashini Dasi* v. *Harendralal Ray* (2) and *Radha Madhab Samonta* v. *Sasti Ram Sen* (3), that where payment is made by a person who puts forward a *bonâ fide* claim to the property in dispute, he is entitled to the protection afforded by section 69 of the Indian Contract Act, even though it ultimately transpires, as a result of litigation, that he had not in fact or in law the interest for the protection whereof the payment was made. In the case before us, the plaintiffs were joined as parties to the mortgage suit by the mortgagee on the allegation that they were some of the legal representatives of the deceased mortgagor. A decree was made against the property to the equity of redemption wherein they claimed an interest. In the present suit the Court of first instance, upon the facts, came to the conclusion that they had an interest in the equity of redemption. The Court of appeal below has, however, come to a different finding upon the evidence. In these circumstances, it is impossible to maintain the view that the plaintiffs were persons in no way interested in the payment of the money which went to satisfy the decree. That decree bound the mortgaged properties wherein the defendants in the present litigation are undoubtedly interested; and the plaintiffs also *bonâ fide* claimed an equal interest. This case is

(1) (1913) 19 C. L. J. 72. (2) (1897) I. L. R. 25 Calc. 305.
(3) (1899) I. L. R. 26 Calc. 826.

1917

SERAFAT ALI v. ISSAN ALI.

consequently clearly distinguishable from *Desai* v. *Bhavabhai* (1) mentioned in the judgment of this Court in *Jinnat Ali* v. *Fateh Ali* (2). It cannot, we think, be reasonably maintained by any stretch of language, that the payment was made by the plaintiffs with a view to manufacture evidence of title to the mortgaged properties when they knew that they had no claim whatsoever.

It is also fairly clear that even if section 69 were not applicable, the case would be covered by section 70. That section provides that where a person lawfully does anything for another person or deliver anything to him, not intending to do so gratuitously, and, such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of or to restore, the thing so done or delivered. There is no controversy that the payment was made by the plaintiffs without intention to do so gratuitously. The only question is whether this was done lawfully. Much reliance has been placed by the respondents on the cases of *Raja Baikunto* v. *Udoy* (3) and *Panchcowri* v. *Hari Das* (4). We do not in any way depart from the exposition of the law contained in these cases, which is perfectly consistent with the view we now take, namely, that a payment in satisfaction of a decree, by a person who is a party to the decree and is bound thereby, is a payment made lawfully within the meaning of section 70.

We hold accordingly that whether section 69 or section 70 be applied, the plaintiffs are bound to succeed. In these circumstances, it is not necessary for us to consider, whether the plaintiffs might not have successfully invoked the aid of the doctrine of subrogation

(1) (1880) I. L. R. 4 Bom. 643.
(2) (1911) 13 C. L. J. 646 ; 15 C. W. N. 332.
(3) (1905) 2 C. L. J. 311.
(4) (1916) 25 C. L. J. 325.

1917

SERAFAT ALI v. ISSAN ALI.

[*Parbhu Narain* v. *Beni* (1), *Dhakeswar* v. *Harihar* (2), *Adusumalli* v. *Valurapalli* (3)], to support the line of reasoning that the plaintiffs are some of the joint judgment debtors, that they have satisfied the mortgage decree whereby they were bound, along with the defendants, and that they have accordingly been subrogated to the rights of the mortgagee decree-holder.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside, and that of the Court of first instance restored. This order will carry costs both here and in the lower Appellate Court.

L. R. *Appeal allowed.*

(1) (1909) 14 C. W. N. 361. (2) (1914) 21 C. L. J. 104.
(3) (1913) 25 Mad. L. J. 16.

CIVIL RULE.

Before Mookerjee and Walmsley JJ.

1917

July 4.

BALAKESHWARI DEBI

v.

JNANANANDA BANERJEE.*

Examination on Commission—Purdanashin lady—Practice—Right of purdanashin lady to be examined on commission—Civil Procedure Code (Act V of 1908), s. 132, cl. (1).

The petitioner, a *purdanashin* lady, applied under s. 132, cl. (*1*), of the Civil Procedure Code, to be examined on commission. The opposite party objected on the ground that she had on a former occasion appeared before a Criminal Court to institute a complaint :—

Held, that she was entitled to be examined on commission and ought not to be compelled to appear in public.

* Civil Rule No. 47 of 1917, against the Order of N. N. Ghosh, Subordinate Judge of Burdwan, dated June 7, 1917.

1917

BALAKESHWARI DEBI v. JNANANANDA BANERJEE.

Chamatkar Mohiney Dabee v. *Mohesh Chunder Bose* (1), *Mohesh Chunder Addy* v. *Manick Lall Addy* (2) followed.

In re Hurro Soondery Chowdhrain (3), *In re Din Tarini Debi* (4), *Abhayeswari Debi* v. *Kishori Mohan Banerjee* (5), *Hem Coomaree Dassee* v. *Queen-Empress* (6), *In re Faridunnissa* (7), *In re Basant Bibi* (8) discussed.

RULE obtained by Balakeshwari Debi, (petitioner).

The facts briefly are these. The petitioner, a *purdanashin* lady, instituted proceedings under the Legal Practitioners Act against one Jnanananda Banerjee, a pleader, practising in the District Judge's Court at Burdwan, who was alleged to have received a *vakalatnama* from one Bhakta Das Samanta purporting to have been executed by the petitioner and another person. The pleader filed the *vakalatnama* in the Subordinate Judge's Court in connection with a civil suit. The petitioner alleged that the said *vakalatnama* was a forged document and that she never authorised anybody to deliver the same to any pleader. She thereupon appeared *personally* and instituted a complaint in a Criminal Court on the 2nd June, 1917, against Bhakta Das Samanta and was examined in *camera*. She further moved the lower Court under section 13 of the Legal Practitioners Act against the pleader and prayed on the 6th June, 1917, that she be examined on commission. The Court below dismissed the application for the issue of a commission on the ground that the petitioner had on the 2nd June, 1917, appeared before the Criminal Court to institute a complaint.

From this order the petitioner moved the High Court.

(1) (1892) I. L. R. 26 Calc. 651n.
(2) (1899) I. L. R. 26 Calc. 650.
(3) (1878) I. L. R. 4 Calc. 20.
(4) (1888) I. L. R. 15 Calc. 775.
(5) (1914) I. L. R. 42 Calc. 19 ; 18 C. W. N. 1020.
(6) (1897) I. L. R. 24 Calc. 551.
(7) (1882) I. L. R. 5 All. 92.
(8) (1889) I. L. R. 12 All. 69.

Babu Biraj Mohan Mazumdar (with him *Babu Ajendra Nath Datta*), for the petitioner, contended that the petitioner could not be compelled to appear in the Subordinate Judge's Court merely because she had once appeared in a Criminal Court to institute a complaint. Moreover, on that occasion she was examined in *camera*: *Chamatkar Mohiney Dabee* v. *Mohesh Chunder Bose* (1), *Mohesh Chunder Addy* v. *Manick Lall Addy* (2).

Dr. Jadunath Kanjilal, for the opposite party, contended that there was no reason why the petitioner should not appear in the Subordinate Judge's Court as she had already appeared before the Criminal Court in connection with the same matter; and she appeared in the Criminal Court voluntarily. In *Chamatkar Mohiney Dabee* v. *Mohesh Chunder Bose* (1), the commission was granted because the lady in that case had been excommunicated.

MOOKERJEE AND WALMSLEY JJ. We are invited in this Rule to set aside an order whereby the Subordinate Judge has refused an application for the issue of a commission for the examination of the petitioner, who is a *purdanashin* lady. The petitioner moved the Court below to institute proceedings under the Legal Practitioners Act against the opposite party, who is alleged to have acted as her pleader. On the 6th June last, she applied to be examined on commission in support of her allegations. The application was opposed, on the ground that as the applicant had appeared before the Criminal Court on the 2nd June to institute a complaint against one Bhakta Das, she should appear before the Subordinate Judge and be examined in Court. The Subordinate

(1) (1892) I. L. R. 26 Calc. 651n. (2) (1899) I. L. R. 26 Calc. 650.

1917

BALAKESHWARI DEBI v. JNANANANDA BANERJEE.

Judge thereupon refused the application. In our opinion, the order cannot possibly be supported.

Section 132, sub-section (*1*) of the Civil Procedure Code of 1908, provides that women, who according to the customs and manners of the country, ought not to be compelled to appear in public, shall be exempt from personal appearance in Court. It is not disputed that the petitioner is a *purdanashin* Hindu lady and, according to the customs and manners of the country, ought not to be compelled to appear in public. The question consequently arises, whether she has forfeited the exemption she enjoys under sub-section (*1*) of section 132, by reason of the fact that she has appeared in a Criminal Court to institute a complaint; on that occasion, the Court room was cleared and she was examined in *camera*. In our opinion, the question should be answered in the negative, in accordance with the principles explained by this Court in the cases of *Chamatkar Mohiney Dabee* v. *Mohesh Chunder Bose* (1) and *Mohesh Chunder Addy* v. *Manick Lall Addy* (2). In the earlier of the two cases, Mr. Justice Trevelyan observed that he should be exceedingly careful before he forced into the public gaze a woman, even though she might have gone outside the *purda* once, either by way of experiment or otherwise. In the second case, Mr. Justice Stanley ordered a commission to issue although it was established that the lady had on a previous occasion appeared in Court and was examined seated inside a palanquin. The Subordinate Judge has overlooked the obvious distinction between the voluntary and the compulsory appearance of a *purdanashin* lady in Court to be examined as a witness. No doubt, a *purdanashin* lady may completely alter her mode of life, and cease to be included in the

(1) (1892) I. L. R. 26 Calc. 651n. (2) (1899) I. L. R. 26 Calc. 650.

statutory description of "women, who, according to the customs and manners of the country, ought not to be compelled to appear in public". When this transformation has taken place, she can no longer claim, as of right, the statutory exemption formulated in section 132. But, if she is, in fact, a *purdanashin* lady, she is not deprived of the statutory protection, merely because she may have previously appeared in public. It is not necessary for our present purpose to investigate exhaustively the law applicable in this respect to criminal cases; but, as the Subordinate Judge has relied upon the fact of the voluntary appearance of the petitioner in a Criminal Court, to her detriment, we may point out that, as regards criminal cases, there has perhaps been a slight divergence of Judicial opinion on the question of the examination of *purdanashin* ladies on commission. In this Court, it has been sometimes maintained [*In re Hurro Soondery Chowdhrain* (1), *In re Din Tarini Debi* (2), *Abhayeswari Debi* v. *Kishori Mohan Banerjee* (3), *Hem Coomaree Dasee* v. *Queen Empress* (4)], that she is entitled to be examined on commission. In Allahabad, on the other hand, *In re Faridunnissa* (5), *In re Basant Bibi* (6), it has been said that a *purdanashin* lady is not entitled as of right to be exempt from personal attendance in Court, although, as a matter of prudence, she should not be compelled to appear. But, whatever may be the exact rule of procedure applicable to criminal cases, the true scope of section 132 of the Civil Procedure Code is not open to serious discussion. We are, consequently, of opinion that in the present case the application by the lady to be examined on commission should not have been opposed in the

(1) (1878) I. L. R. 4 Calc. 20.
(2) (1888) I. L. R. 15 Calc. 775.
(3) (1914) I. L. R. 42 Calc. 19.
(4) (1897) I. L. R. 24 Calc. 551.
(5) (1882) I. L. R. 5 All 92.
(6) (1889) I. L. R. 12 All. 69.

1917

BALAKESHWARI DEBI v. JNANANANDA BANERJEE.

Court below, or in this Court, and we cannot but express our surprise that a person in the position of the opposite party should have thought it proper to take up and maintain such an attitude.

The result is that this Rule is made absolute. We direct that a commission do issue for the examination of the petitioner in accordance with law. As the Rule has been opposed, the petitioner will have her costs in this Court.*

L. R. *Rule absolute.*

* See *Solomon* v. *Jyotsna Ghosal*, p. 492 *ante*.

APPEAL FROM ORIGINAL CIVIL.

Before Sanderson C.J. and Woodroffe J.

1917

Aug. 27.

SATISH RANJAN DAS

v.

MERCANTILE BANK OF INDIA, LD.*

Mortgage—Second mortgage-debt secured by sureties—Assignment of equity of redemption to sureties—Sub-mortgage by sureties in favour of assignor—Sale of mortgaged property by prior mortgagee—Subsequent sale by sub-mortgagee—Remainder of mortgaged property in existence and available for sale insufficient to satisfy sub-mortgagee's debt—Application for personal decree against sub-mortgagors—Civil Procedure Code (Act V of 1908) O. XXXIV, r. 6.

The plaintiffs, who were the mortgagees of the equity of redemption in respect of certain properties, further secured their mortgage debt by a promissory note executed in their favour by two sureties on behalf of the mortgagor. They subsequently assigned their equity of redemption to the sureties, who executed a sub-mortgage thereof in favour of the plaintiffs. Sometime after, the plaintiffs obtained a preliminary mortgage decree, which was later followed by a final decree directing that the premises

* Appeal from Original Civil, No. 65 of 1917, in Suit No. 1158 of 1914.

charged under the mortgage, or a sufficient part thereof, should be sold subject to the prior mortgage. In the meantime between the dates of the preliminary and final decrees, the mortgagor having been adjudicated an insolvent, the prior mortgagee obtained an order of the Court exercising insolvency jurisdiction, that the zemindari properties included in the prior mortgage should be sold free from all incumbrances, and that the balance of the sale-proceeds, after payment of the costs of the sale and the claim of the prior mortgagee, should be retained by the Official Assignee and be paid by him in discharge of other incumbrances in accordance with their respective priorities. The sale was duly carried out by the Officia Assignee in pursuance of this order. The amount thus realised was not sufficient to meet the debt of the prior mortgagee. Subsequently, in pursuance of the mortgage decree, the Registrar put up for sale the equity of redemption in certain properties specified in the plaintiffs' mortgage and remaining unsold at the sale by the Official Assignee, and as the amount realised at the Registrar's sale was not sufficient to meet the plaintiffs' debt, the plaintiffs applied for and obtained a personal decree against the sub-mortgagors for the amount of their claim :—

Held, that the plaintiff's claim for a personal decree was not debarred.

Per SANDERSON C. J. Having regard to the fact that all the properties covered by the mortgage, which were in existence and which were available for sale at the date of the sale, were sold (by the Registrar), and assuming that the plaintiffs were not responsible for the fact that some of the properties included in the mortgage were not in reality available for sale, though the sale purported to include them, I think it should be taken that the provisions contained in the rules and the directions contained in the mortgage decrees as to the sale have been complied with, and that the plaintiffs are entitled to the personal decree which the learned Judge has directed.

Ram Ranjan Chakravarti v. *Indra Narain Dass* (1) and *Badri Das* v. *Inayat Khan* (2) distinguished.

Per WOODROFFE J. We must look at this matter rationally and with reference to the reason of the rule, namely, that the personal liability will only be enforced where there is a deficiency after the sale of all the motgaged property available for sale at the date of sale. In other words, the personal liability must not be improperly increased.

APPEAL by Satish Ranjan Das, the defendant.

The facts of this case are set forth at length in the judgment.

(1) (1906) I. L. R. 33 Calc. 890. (2) (1900) I. L. R. 22 All. 404.

1917

SATISH RANJAN DAS v. MERCANTILE BANK OF INDIA, LD.

The offg. Advocate-General (*Mr. B. C. Mitter*) with him *Mr. C. C. Ghose*, for the appellant, relied on *Ram Ranjan Chakravarti* v. *Indra Narain Dass* (1), *Badri Das* v. *Inayat Khan* (2) and *Pirbhu Narain Singh* v. *Baldeo Misra* (3).

Mr. P. L. Buckland, for the respondent Bank, relied on *Sheo Prasad* v. *Behari Lal* (4), *Kedar Nath* v. *Chandu Mal* (5) and *Pirbhu Narain Singh* v. *Amir Singh* (6). But see *Kamta Prasad* v. *Saiyed Ahmad* (7) contra.

The Advocate-General, in reply.

Cur. adv. vult.

SANDERSON C. J. This is an appeal by the defendant, Mr. S. R. Das, against the judgment of Chaudhuri J., whereby he held that the plaintiff Bank was entitled to a personal decree against the first and second defendants.

It was contended that the plaintiffs were not entitled to a personal decree under Order XXXIV, rule 6 of the Code of Civil Procedure inasmuch as the conditions precedent entitling them to ask for such a decree had not been fulfilled: and the terms of the decrees, dated 8th February, 1915, and 28th February, 1916, had not been carried out.

The facts were as follows:—

A. H. Guznavi was indebted to the Allahabad Bank and his indebtedness was secured by mortgage of certain properties.

He was also indebted to the plaintiff Bank. On the 1st August, 1913, A. H. Guznavi executed a mortgage to the plaintiff Bank to secure the floating

(1) (1906) I. L. R. 33 Calc. 890.
(2) (1900) I. L. R. 22 All. 404.
(3) (1906) I. L. R. 29 All. 260.
(4) (1902) I. L. R. 25 All. 79.
(5) (1903) I. L. R. 26 All. 25.
(6) (1907) I. L. R. 29 All. 369.
(7) (1909) I. L. R. 31 All. 373.

balance. This mortgage was with respect to the same properties as were covered by the mortgage held by the Allahabad Bank and was subject thereto.

On the 13th September, 1913, the defendants, A. K. Guznavi (a brother of the mortgagor) and Mr. S. R. Das, executed a promissory note payable on demand in favour of the plaintiff Bank for Rs. 2,55,000 with interest thereon as security for A. H. Guznavi's indebtedness. On the 23rd September, 1913, the plaintiff Bank, by a deed executed on that day wherein it was recited that the transferees had, at the request of the mortgagor, agreed to give to the Bank their joint and several promissory note for the amount secured by the within written Indenture, transferred the debt due to the plaintiffs from A. H. Guznavi and the mortgaged properties to the defendants A. K. Guznavi and S. R. Das.

On the 24th September, 1913, the defendants, A. K. Guznavi and S. R. Das, deposited with the plaintiff Bank the title deeds, *viz.*, the mortgage of the 1st August, 1913, and the transfer deed of 23rd September, 1913, with the plaintiff Bank, and executed a declaration of mortgage to the effect that the said Indentures had been deposited to secure the payment by the said defendants of the sum of Rs. 2,55,000 secured by the said promissory note and interest, and undertook to execute a legal or formal sub-mortgage of the premises comprised in the Indentures.

On the 12th November, 1914, the plaintiffs sued A. K. Guznavi, S. R. Das and A. H. Guznavi. By paragraph 5 of the plaint, the plaintiffs submitted that they were entitled to a decree against the 1st and 2nd defendants for the sums secured under promissory note of 13th September, 1913, and they claimed further to be entitled to a mortgage decree in respect of the properties mentioned and contained in the Indentures

1917

SATISH RANJAN DAS v. MERCANTILE BANK OF INDIA, LD.

SANDERSON C.J.

of 1st of August, 1913, and the 23rd September, 1913.

In this suit a preliminary mortgage decree was made on the 8th of February, 1915, and no personal decree in respect of the promissory note was made.

It was stated, during the course of the argument, that no personal decree in respect of the promissory note was asked for at the hearing.

On the 21st July, 1915, A. H. Guznavi was adjudicated an insolvent.

In pursuance of the mortgage decree of 8th February, 1915, the Registrar took an account of what was due to the plaintiff Bank for principal and interest on the promissory note and, on the 23rd July, 1915, he reported that on the 11th February, 1916, there would be due to the plaintiff Bank, upon and by virtue of the promissory note in the said decree mentioned, the sum of Rs. 2,73,026-10-10 for principal and interest to the said 11th February, 1916, and appointed the 12th February, 1916, as the time for the defendants to pay the said sum of Rs. 2,73,026-10-10 and costs and interest.

Nothing was paid in respect of that decree on the date above mentioned or at any time.

In October, 1915, an application was made by the Allahabad Bank to the Judge exercising Insolvency Jurisdiction, on notice to the plaintiffs, A. H. Guznavi, A. K. Guznavi and S. R Das, and Greaves J. made an order under the Presidency Towns Insolvency Act, 1909, that the properties included in the mortgage of the Allahabad Bank should be sold by the Official Assignee free from all incumbrances, and that the balance of the sale-proceeds, after payment of the costs of the sale and the claim of the Allahabad Bank, should be retained by the Official Assignee and be paid by him in discharge of other incumbrances in accordance

1917

SATISH RANJAN DAS v. MERCANTILE BANK OF INDIA, LD.

SANDERSON C.J.

with their respective priorities. On the hearing of this application, the defendant S. R. Das appeared and opposed the application, but the plaintiffs, though they had been requested by the attorneys of the defendant S. R. Das to oppose the application, did not do so.

In spite of the opposition of the defendant S. R. Das the Court made the order aforesaid. This order was not drawn up until 4th January, 1916.

Nothing having been paid on the appointed day, *viz.* the 12th February, 1916, by the defendants, on the 28th February, 1916, a final decree in this suit was made, whereby it was ordered that the premises charged under the mortgage in the decree of the 8th February, 1915, mentioned, or a sufficient part thereof, should be sold subject to a prior mortgage in favor of the Allahabad Bank in the said decree mentioned. The drawing up of this order was directed to be postponed for three months, and we were informed during the argument that the plaintiffs protested against the postponement. On the 9th January, 1917, the sale, directed by the order of the 4th January, 1916, of the Insolvency Court, was carried out by the Official Assignee: the property realised about Rs. 60,000 only, which was not enough to meet the amount due to the Allahabad Bank upon the first mortgage: such amount, we were informed, was over five lakhs of rupees.

An application was, thereupon, made by the plaintiffs to Chitty J. for a personal decree against the defendants, A. K. Guznavi and S. R. Das, for Rs. 2,88,862-3-3 and costs due under the decrees of the 8th February, 1915, and 28th February, 1916, and under an order in the suit dated 11th February, 1915, and interest. On the 30th January, 1917, Chitty J. dismissed this application on the ground that the conditions precedent contained in the decree of the 8th February, 1915, had

1917

SATISH RANJAN DAS v. MERCANTILE BANK OF INDIA, LD.

SANDERSON C.J.

not been fulfilled, *i.e.*, that the mortgaged property had not been sold in pursuance of the mortgage decree.

On the 26th June, 1917, this Court, on appeal, upheld Chitty J.'s judgment.

On the 21st April, 1917, pursuant to the decrees of the 8th February, 1915, and the 28th February, 1916, the Registrar put up for sale the equity of redemption in the following properties :—

"*Lot A.*—All that unexpired term of a verbal tenancy for six years from November 1911 of No. 7, Bowbazar Street, Calcutta (possession of which has already been surrendered), together with any rights still subsisting in the stock-in-trade (already sold by a prior mortgagee) and outstandings due to the defendant, A. H. Guznavi, in his business of the United Bengal Company.

Lot B.—All the claims of the defendant, A. H. Guznavi, against Messrs. Berg Sons & Co., Ld., and Messrs. Donald Campbell & Co., respectively (which the said A. H. Guznavi says are non-existent).

Lot C.—All that the interest (if any) of the defendant A. H. Guznavi in the zemindaries in the districts of Mymensingh and Pabna (which interest was on the 9th January, 1917, sold free from incumbrances by the Official Assignee of Calcutta as Assignee of A. H. Guznavi an insolvent under an order of this Court, dated the 4th January, 1916)."

At the sale one G. N. Kapur purchased the above-mentioned lots at the total of Rs. 20—Rs. 10 for *lot A*, Rs. 5 for *lot B*, and Rs. 5 for *lot C*.

It appears that Chaudhuri J. issued a Rule on the 5th March, 1917, for a review of the decree of the 8th February, 1915, but on the hearing he dismissed the application for review.

On the 14th May, 1917, an application was made by the plaintiff Bank to Chaudhuri J. for a personal decree against the defendants, A. K. Guznavi and S. R. Das, for Rs. 2,93,893-0-11 and costs due to the plaintiffs under the decrees of 8th February, 1915, and the 28th February, 1916, and the order of 11th February, 1915, and interest, and on the 12th July, 1917, Chaudhuri J. held that the plaintiffs had fulfilled the requirements of the Civil Procedure Code and were entitled to a

personal decree against the first and second defendants for the said sum less the sum realised by the sale, if that sum had not already been taken into account, and a decree was made accordingly.

From this judgment the defendants, A. K. Guznavi and S. R. Das, have appealed.

The appeal which was argued was that of the defendant, S. R. Das, and it was agreed by learned counsel that the appeal of the defendant, A. K. Guznavi, would, as a matter of course, follow the event of this appeal.

The decrees of the 8th February, 1915, and of the 28th February, 1916, were made in pursuance of the provisions of Order XXXIV, rules 4 (*1*) and 5 (*2*), and the application for a personal decree against the two defendants was in pursuance of Order XXXIV, rule 6.

It was contended by the learned Advocate-General on behalf of the defendant, S. R. Das, that in view of the provisions of the above-mentioned rules and in view of the terms of the said decrees, the Court had no jurisdiction to make a decree for personal liability of this defendant until all the properties included in the decree, had been sold in pursuance thereof: that the words "or a sufficient part thereof" in Order XXXIV, rule 5 (*2*), which are also to be found in both the said decrees, showed that not less than the whole of the properties mentioned in the decrees must be sold in order to comply with the provisions of the rules and with the terms of the decrees, that the question of sufficiency could not arise unless it was intended the whole should be sold if necessary to liquidate the amount secured by the mortgage, that as regards the lots mentioned in the Notification of Sale of the 21st April, 1917, *lot C* comprised the interest (if any) of A. H. Guznavi in the zemindaries; that these zemindaries had been sold by the Official Assignee of

1917

SATISH RANJAN DAS v. MERCANTILE BANK OF INDIA, LD.

SANDERSON C.J.

A. H. Guznavi, an insolvent, pursuant to the order of Greaves J. of 4th January, 1916, free from all incumbrances: that although it might be that such order was a wrong order, it was made by a Court of competent jurisdiction and that no appeal had been made against it, though the plaintiffs could have appealed, if they had so desired: that, consequently, the order for sale by the Official Assignee must be considered as a valid order, and the sale must be held a valid sale: that the properties having been sold free from incumbrances, the result of the sale was that the whole interest in the zemindaries went to the purchaser and that thereafter the right of the plaintiffs was confined to the balance of the sale-proceeds, if there were any, after the first mortgagee's claim had been satisfied: that, consequently, as regards *lot C*, there was nothing which could be sold on the 21st April, 1917, and therefore that, as the whole of the properties mentioned in the decrees had not been sold in pursuance of such decrees, the defendant could not be made liable personally.

It cannot be said that the sale of the 21st April, 1917, was altogether nugatory: for there were included in the lots, two items which had not been sold by the Official Assignee, *viz.*, (*i*) "outstandings due to the defendant, A. H. Guznavi, in his business of the United Bengal Company" mentioned in *lot A*, and (*ii*) *lot B*, "all the claims of the defendant, A. H. Guznavi against Berg Sons & Co., Ld., and Messrs. Donald Campbell & Co., respectively, which the said A. H. Guznavi says are non-existent".

These two items were specifically mentioned in the mortgage of the 1st August, 1913, which was one of the deeds referred to in the memorandum of deposit, dated the 24th September, 1913, made by defendants, A. K. Guznavi and S. R. Das.

In this mortgage it was recited that the mortgagor was entitled to a sum of about £ 6,438-1-7 then owing by Messrs. Berg Sons & Co., Ld., and also to a sum amounting to £ 4,870-7-8 then owing by Messrs. Donald Campbell & Co.

Although these two items at the time of the sale were apparently of very little value, they were included in the mortgage, they were included by the Registrar in the Notification of Sale, they had not been sold prior to the 21st April, 1917, and they were sold at the sale of that date by the Registrar in pursuance of the decrees of the 8th February, 1915, and the 28th February, 1916.

Further, the interest, if any, of A. H. Guznavi in the zemindaris was sold at the same sale.

As regards this last item and also as regards the unexpired term, which had been surrendered, and the stock-in-trade at 7, Bowbazar Street, which had already been sold by a prior mortgagee, I think it must be taken that there was nothing in fact to sell.

Mr. Buckland, however, for the Bank, contended that this would not affect the Bank's right to a personal decree for the sale *purported* to be a sale of all the mortgaged property, and for the purposes of this case it made no matter whether the Bank had any title to the property purported to be sold and that consequently the decrees of the 8th February, 1915, and the 28th February, 1916, had been carried out.

This argument I do not adopt. I do not think it would be right to hold that the decrees had been carried out by means of what purported to be a sale by the Registrar, if the properties offered did not in fact exist at the time of the sale although they had been included in the mortgage. But this does not dispose of the case, for the plaintiffs urged that the decrees had been complied with, inasmuch as the Registrar

1917

SATISH RANJAN DAS v. MERCANTILE BANK OF INDIA, LD.

SANDERSON C. J.

sold in pursuance of the decrees all the properties covered by the mortgage which were in existence and available for sale at the time of the sale of the 21st of April, 1917, and that more than this could not be done.

If it could be shown that the properties which were included in the mortgage, and which could not be sold in pursuance of the decrees, were in fact not sold owing to some action or default of the plaintiffs so as to impose on the mortgagees a personal liability to which otherwise they would not have been liable, then I think the plaintiffs would be debarred from obtaining the decree for personal liability which they claim: see *Ram Ranjan Chakravarti* v. *Indra Narain Dass* (1). There are two grounds relied upon by the defendant in this respect.

First, it was argued that the plaintiffs should have appeared at the hearing of the application before Greaves J. and that the plaintiffs should have joined the defendant, S. R. Das, in opposing the making of the order for sale by the Official Assignee free from incumbrances.

Reliance was placed on the fact that the plaintiffs received not only a notice of the application but also a request from the Attorneys of this defendant to oppose the application and, consequently, it was urged that the plaintiffs were to some extent responsible for the fact that the equity of redemption in the zemindaries could not be sold in pursuance of the decrees.

I do not think this is sufficient to debar the plaintiff's claim. The defendant, S. R. Das, was one of the second mortgagees who had made a sub-mortgage by the deposit of the deeds with the Bank. This defendant appeared by counsel and opposed the application, and no doubt all that could be urged against the application was urged, and I do not think we ought to

(1) (1906) I. L. R. 33 Calc. 890.

assume that if the Bank, who would have been claiming under the defendant, S. R. Das, had opposed the application, such opposition would have made any difference.

It is true that if the plaintiffs' advisers had been aware of the point which has now been taken (a point which, as far as this case is concerned, is purely a technical one), they might have urged it before the Judge and argued that a sale by the Official Assignee might prevent the decrees of the 8th February, 1915, and 28th February, 1916, being carried out so that the plaintiffs' remedy against these defendants personally might be endangered, but I think it is fairly obvious that such a possibility never entered into the consideration either of the plaintiffs or these two defendants at the time, and that they were relying upon the sale of the zemindari properties producing a sum sufficient to meet the claims of both the Banks.

Secondly, it was urged that although the order of the 28th February, 1916, was postponed for 3 months, the sale by the Official Assignee did not take place until the 9th January, 1917, and the plaintiffs might have applied to have the decree of the 28th February, 1916, carried out before that time.

We have no information as to what was the cause of this delay and we are not at liberty to speculate.

The fact is patent, however, that considerable delay took place in carrying out both the mortgage decree of 28th February, 1916, and the decree of the Insolvency Court of 4th January, 1916. The sale by the Official Assignee did not take place until 9th January, 1917.

The properties are apparently of considerable size, the preparation for the sale thereof would take some considerable time and they were thought to be of much greater value than the amount eventually realised; indeed, I think it was admitted during the argument

1917

SATISH RANJAN DAS v. MERCANTILE BANK OF INDIA, LD.

SANDERSON C.J.

that both the plaintiffs and these two defendants were hoping that the sale would realise enough to meet the claims of the two Banks and thus relieve these two defendants of all personal liability. Unfortunately this expected contingency did not happen, but I do not think that the plaintiffs by reason of the delay, under these circumstances can be said to have been responsible for the fact that the equity of redemption was not available for sale by the Registrar under the mortgage decrees on the 21st April, 1917. There remains, therefore, the point urged by the learned Advocate-General, *viz.*, that inasmuch as all the properties included in the decrees were not sold in pursuance thereof, the plaintiffs are debarred from obtaining a personal decree against these defendants The decrees do not mention the properties specifically, but the properties are described therein by reference to the mortgage of 1st August, 1913, and the Indenture of 23rd September, 1913.

The plaintiffs' security was a memorandum of deposit by the second mortgagees; and their security was, therefore, subject to the Allahabad Bank's first mortgage and subject to the rights of that Bank incidental to the first mortgage.

It was in pursuance of such rights that the Allahabad Bank obtained the order for the sale of the zemindari properties free from incumbrances, and that, consequently, these properties were not available for sale on the 21st April, 1917, in pursuance of the mortgage decrees obtained by the plaintiffs.

The question, therefore, is whether the fact, that some of the properties included in the above mentioned indentures, and therefore included in the mortgage decrees, have since the date of the decrees and by reason of the prosecution of their rights by the first mortgagees and through no act or default of the plaintiffs

become not available for sale, is sufficient to debar the plaintiffs' claim for a personal decree.

In my judgment, we should be putting too narrow and rigid a construction upon the provisions contained in the rules and upon the terms of the decrees if we were so to hold. The object of the rules obviously is that the remedy of the mortgagee should in the first instance be against the property mortgaged, and that such property should be exhausted before a personal liability is imposed upon the mortgagor. But the rules surely cannot mean that if a portion of the property, however small, which was included in the mortgage and therefore included in the mortgage decree as a portion of that which was to be sold, is destroyed or ceases to be available for sale after the date of the decree and through no fault of the mortgagee, then there can be no decree for personal liability against the mortgagor.

Yet this is what is involved in the argument of the learned Advocate-General.

It was not denied that if the provisions of Order XXXIV, rule 5 and the directions of the decrees as regards the sale of the properties have been complied with, the plaintiffs would be entitled to a personal decree under Order XXXIV, rule 6.

Having regard, therefore, to the fact that all the properties covered by the mortgage, which were in existence and which were available for sale at the date of the sale, were sold on the 21st April, 1917, and assuming, as I have held, that the plaintiffs were not responsible for the fact that some of the properties included in the mortgage were not in reality available for sale, though the sale purported to include them, I think it should be taken that the provisions contained in the rules and the directions contained in the mortgage decrees as to the sale have been complied

1917

SATISH RANJAN DAS v. MERCANTILE BANK OF INDIA, LD.

SANDERSON C.J.

with and that the plaintiffs are entitled to the personal decree which the learned Judge has directed. It was argued that this case was covered by our previous decision upon the appeal from Chitty J. I do not think that is so: at that time no sale had taken place in pursuance of the mortgage decrees whereas a material fact on this appeal is that a *bonâ fide* sale has been held whereby all the properties covered by the mortgage, which were available for sale, have been sold in pursuance of the decrees.

Some cases were cited before us, and much reliance was placed by the learned Advocate-General upon *Badri Das* v. *Inayat Khan*(1) and the case already referred to [*Ram Ranjan Chakravarti* v. *Indra Narain Dass* (2)].

The learned Judges in the Allahabad case apparently held on the facts of the case that either the previous sale of the zemindari properties which had taken place was due to the fault of the appellant, or, if it was not, the appellant had still a right of redemption which had not been sold, and consequently that the whole of the mortgaged property had not been brought to sale.

As regards the case of *Ram Ranjan Chakravarti* v. *Indra Narain Dass* (2), the *ratio decidendi* was that as the mortgagees had released substantial portions of the property originally mortgaged and the purchasers of these portions from the mortgage debt, and without the consent of the mortgagors, it was held that the mortgagees, could not release a portion of the mortgage property to the detriment of the mortgagor, so as to impose on him a personal liability, to which otherwise he would not be subject. I do not think that either of these cases covers the present case, and it is not necessary, therefore, for me

(1) (1900) I. L. R. 22 All. 404. (2) (1906) I. L. R. 33 Calc. 890.

to say whether I agree with the decision in the Allahabad case. In any event it is not binding on this Court.

It is to be noted that on the facts of this case the point which has been relied upon by the appellant is merely a technical one ; for, if the course, which the learned Advocate-General argued should have been taken, had in fact been followed, and if all the properties included in the plaintiffs' mortgage had been sold in accordance with the decrees, such properties must have been sold subject to the first mortgage of the Allahabad Bank : the debt due to that Bank was over five lakhs of rupees : the properties when sold by the Official Assignee produced Rs. 60,000 : it was said that if the property had been sold by the Court instead of by the Official Assignee, it might have fetched more, having regard to the high reputation obtaining for sales by the Court. But making all due allowance in that respect, the difference between the price fetched by the property and the debt due to the Allahabad Bank is so large that it is obvious that even if the property had been sold by the Court, the first mortgage would not have been satisfied and there would have been nothing left for the plaintiffs.

Consequently, if that course had been followed, the two appellant defendants would have been in no better position. In fact they would have been worse off : they would not have obtained credit for even the Rs. 20, the result of the sale of the 21st April, 1917, which has been directed to be deducted from the plaintiffs' claim.

For the above-mentioned reasons, in my judgment, this appeal should be dismissed with costs.

WOODROFFE J. It may be that if the whole of the mortgaged properties had been sold by the Official

1917

SATISH RANJAN DAS v. MERCANTILE BANK OF INDIA, LD.

WOODROFFE J.

Assignee, there could not have been another sale under the mortgage decree. But that is not the case here. What was sold by the Official Assignee were zemindaries in Mymensingh and Pabna. The Official Assignee did not sell two other properties, *viz.*, (*a*) outstandings due to A. H. Guznavi in his business of the United Bengal Company. The paper-book on this point has been misprinted, (*b*) the claims of the said defendant against Messrs. Berg Sons Ld., and Messrs. Donald Campbell & Co. It is said that nothing is due on any of these accounts. This may be the statement of A. H. Guznavi, but it does not prevent this apparent interest of his being sold. If it be the fact that a mortgagor represented that there was money due to him and mortgaged it, the mortgagee cannot be prejudiced in his personal remedies if such statement were in fact untrue. If it were so, a man might fraudulently represent that he was the owner of property and mortgage it and thus prevent the carrying out of a mortgage decree on the ground that there was no property to sell.

But it is next argued that even if properties (*a*) and (*b*) were not sold and could be sold under the mortgage decree, that would not entitle the mortgagee to a decree for the balance. It is argued that the property which must be sold before such balance is ascertained must be the whole property but that though properties (*a*) and (*b*) had not been sold, yet the zemindaries had been sold and therefore the whole of the mortgaged property could not be sold so as to found an application for a personal decree for the balance. The zemindari property was in fact put up for sale. Even if it be assumed that these properties could not be re-sold, then all the property which could be sold was in fact sold and fetched Rs. 20 which indicates that it is worth something. The argument of the appellant is

of a highly technical character. I am not prepared to hold that the present case is without the scope of the order. No doubt the argument may be with strictness maintained that a personal decree cannot be obtained in any case where the whole of the property directed to be sold has not been sold for whatsoever cause may be. But such a rigid interpretation of the section would lead to mainfest absurdity and injustice. Thus, as was put in the argument, if, after a decree directing the sale of land and a house, the latter should be burnt so that it could not be sold, in such a case on the argument of the appellant no personal decree could be got because, as a foundation for it, the whole mortgaged property, namely, land and house directed to be sold, could not be sold. We must look at this matter rationally and with reference to the reason of the rule, namely, that the personal liability will only be enforced where there is a deficiency after the sale of all the mortgaged property available for sale at the date of sale. In other words, the personal liability must not be improperly increased. I cannot say that the conclusion at which the learned Judge has arrived is erroneous, and I agree that the appeal should be dismissed with costs.

O. M.

Appeal dismissed.

Attorneys for the appellant : *Leslie & Hinds.*

Attorneys for the respondents : *Sanderson & Co., G. C. Chunder & Co.; Hem Chunder Banerjee.*

APPELLATE CRIMINAL.

Before Teunon and Richardson JJ.

1917

Oct. 9.

AKHOY KUMAR MOOKERJEE

v.

EMPEROR.*

Witness—Competency of a person, accused of an offence, as witness against another implicated therein, but separately tried—Admissibility of the deposition of a witness against himself on his subsequent trial—Evidence Act (I of 1872) ss. 118, 132—Oaths Act (X of 1873) s. 5—Criminal Procedure Code (Act V of 1898) s. 342 (4).

Section 5 of the Oaths Act (X of 1873) and section 342 (4) of the Criminal Procedure Code apply only to the accused actually under trial at the time. Such person cannot, therefore, be sworn as a witness, and no accused jointly tried is a competent witness for, or against, the co-accused.

But when accused persons are tried separately, each one, though implicated in the same offence, is a competent witness at the trial of the other.

Reg. v. *Narayan Sundar* (1) and *Empress* v. *Durant* (2) followed.

Banu Singh v. *Emperor* (3) and *Amrita Lal Hazra* v. *Emperor* (4) approved.

Queen-Empress v. *Mona Puna* (5), *Subrahmania Ayyar* v. *King-Emperor* (6) and *Queen-Empress* v. *Hussein Haji* (7) referred to.

A previous deposition is admissible against the witness on his subsequent trial, unless he has brought himself within the protection of the proviso to s. 132 of the Evidence Act.

King-Emperor v. *Nanda Gopal Roy* (8) explained and distinguished.

ON the 22nd January, 1917, one Surendra Nath Ghose, a weighman in the firm of Hara Nath, Shashi

* Criminal Appeal, No. 479 of 1917, against the order of Abdus Salam, Third Presidency Magistrate, Calcutta, dated July 27, 1917.

(1) (1868) 5 Bom. H. C. R. 1.
(2) (1898) I. L. R. 23 Bom 213.
(3) (1906) I. L. R. 33 Calc. 1353, 1357.
(4) (1915) I. L. R. 42 Calc. 957, 986.
(5) (1892) I. L. R. 16 Bom. 661.
(6) (1901) I. L. R 25 Mad. 61.
(7) (1900) I. L. R. 25 Bom. 422
(8) (1916) 20 C. W. N. 1128, 1132

Bhusan, Kedarnath Burman, received six Government currency notes, of Rs. 1,000 each, from Raj Kumar Mookerjee. At about 8 P.M. of the same day, Surendra Nath was passing through Kantapooker on his way home when he was waylaid by three men and robbed of the money. He informed the police who communicated with the Paper Currency Office. On the 26th January, Sheo Pershad Chatterjee, a clerk in the Currency Office, presented two of the stolen notes for encashment and was arrested. On information given by him, the present appellant was also arrested. They were put on trial before Mr. Keays, Second Presidency Magistrate, and separate trials were directed to be held. The case of Sheo Pershad was first taken up, and the appellant was examined as a prosecution witness. Sheo Pershad was convicted by the Magistrate, but acquitted by the High Court.

The appellant was then tried before Moulvi Abdus Salam, Third Presidency Magistrate, on a charge, in the alternative, under s. 411 or 414 of the Penal Code. Sheo Pershad was examined by the prosecution at the trial, and stated that he had received the two notes from the appellant to be cashed, and the previous deposition of the appellant containing an admission to the same effect was admitted in evidence against him. He was convicted under the above sections, in the alternative, and sentenced to one year's rigorous imprisonment, on the 27th July. He now appealed to the High Court.

Babu Manmatha Nath Mookerjee, for the appellant.

The Deputy Legal Remembrancer (*Mr. Orr*), for the Crown.

Cur. adv. vult.

TEUNON AND RICHARDSON JJ. The appellant, Akhoy Kumar Mookerjee, *alias* Bhut Nath Mookerjee,

1917

AKHOY KUMAR MOOKERJEE v. EMPEROR.

has been convicted by the Third Presidency Magistrate Mr. Abdus Salam, in the alternative, under section 411 or section 414 of the Penal Code, and sentenced to rigorous imprisonment for one year.

The case relates to two currency notes of Rs. 1,000, each, which were undoubtedly stolen on the 22nd January, 1917, and subsequently, on the 26th January, presented for encashment at the Paper Currency Office, by Sheo Pershad Chatterjee, a clerk of that office. Sheo Pershad's arrest led to the arrest of the appellant. The police placed the two men for trial before Mr. Keays, the Second Presidency Magistrate. Mr. Keays, as he was at liberty to do, directed that they should be tried separately. Sheo Pershad's case was taken first, and at his trial the appellant was put in the witness-box and gave evidence. In the result, Sheo Pershad was convicted, but the conviction was subsequently set aside by this Court. Now the appellant has been tried, and his deposition in Sheo Pershad's case has been used as evidence against himself. His learned pleader, Mr. Manmatha Nath Mookerjee has urged on his behalf that the deposition is inadmissible mainly on the ground that the appellant was not a competent witness for or against Sheo Pershad.

The general rule on the subject of the competency of witnesses is contained in section 118 of the Evidence Act:

"All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind."

The Evidence Act is silent as to accused persons, but section 5 of the Indian Oaths Act (Act X of 1873)

provides that "Nothing herein contained shall render it lawful to administer, in a criminal proceeding, an oath or affirmation to the accused person," and clause (*4*) of section 342 of the Criminal Procedure Code similarly provides that "No oath shall be administered to the accused." It is undisputed, therefore, that an accused person actually under trial cannot be sworn as a witness, and that if two or more persons are being jointly tried, none of them is a competent witness for or against the others. But in our opinion this exception to the general rule goes no further, and has no application to an accused person who is not at the time under trial. Accordingly when two persons, though they may be accused of complicity in the same offence, are tried separately, each is a competent witness at the trial of the other.

We are disposed to regard the law as settled in this sense, and it is only in deference to the arguments addressed to us that we go further into the matter.

It is hardly contested that the provision in the Criminal Procedure Code, regard being had to its context, applies only to the accused actually under trial, and it appears to us that the language of the Oaths Act is capable of, and should receive, a like interpretation. The accused person in a criminal proceeding is the accused who is the subject of that particular proceeding.

This view is in accord with English practice: Stephen's "Digest of the Law of Evidence," Article 108; Archbold's Criminal Pleading, Evidence and Practice, 23rd edition, page 394 *note*. In India the law was laid down as we have stated it so long ago as the year 1868 by Couch C.J. and Newton J. in *Reg.* v. *Narayan Sundar* (1). It is true that the Oaths

(1) (1868) 5 Bom. H. C. R. 1.

1917

AKHOY KUMAR MOOKERJEE v. EMPEROR.

Act had not then been passed, but section 204 of the first Criminal Procedure Code (Act XXV of 1861) was to the same effect as the corresponding provision in the present Code to which we have referred. It may be that some difficulty has since been caused in this connection by certain decisions relating to illegal or irregular pardons. The earlier cases are referred to, and distinguished or explained in *Queen-Empress* v. *Mona Puna* (1). In these and other cases the true question appears to be whether several persons having been placed on their trial together, the proceedings as against one of them have come to an end so as to remove the impediment to his being examined as a witness for or against the others: see *Subrahmania Ayyar* v. *King-Emperor* (2) *per* Arnold C.J., and *Queen-Empress* v. *Hussein Haji* (3). On this question, as it has arisen in particular cases or in particular circumstances, there may have been some conflict of opinion and the decisions may not be entirely reconcilable. Possibly, too, traces may be found of some confusion between the competency of a person as a witness and the admissibility of any evidence such person may have to give. However that may be, in the case before us the appellant and Sheo Pershad were never on their trial together. Sheo Pershad was tried separately. In such a case the rule applicable is that laid down in *Reg.* v. *Narayan Sundar* (4). already cited, and again in *Empress* v. *Durant* (5). The latter case, which was decided by Candy J., upon the present Code, is clearly in point. Full reasons for the decision, with which we generally concur, will be found in the judgment of the learned Judge, and if the decision was not actually approved and adopted by this Court in

(1) (1892) I. L. R. 16 Bom. 661.
(2) (1901) I. L. R. 25 Mad. 61, 67.
(3) (1900) I. L. R. 25 Bom. 422.
(4) (1868) 5 Bom. H. C. R. 1.
(5) (1898) I. L. R. 23 Bom. 213.

Banu Singh v. *Emperor* (1), it was certainly not dissented from. In fact at page 1357 of the report, the learned Judges (Mitra and Holmwood JJ.), say this :—

"The law, however, is well settled . . . that an accomplice, if he is not an accused under trial in the same case, is a competent witness, and may, as any other witness, be examined on oath."

That expression of opinion, even if it be nothing more, certainly supports our conclusion that the appellant was a competent witness at the trial of Sheo Pershad, a conclusion which is also supported by the observations of another Bench of this Court in *Amrita Lal Hazra* v. *Emperor* (2).

We may mention that, as the cases show, it may often be to the advantage of the accused actually under trial that a person alleged to be an accomplice should be put into the witness-box.

It was next argued that if the appellant was a competent witness at Sheo Pershad's trial, the evidence he gave was not admissible against himself at his own trial. It was not suggested that the appellant had brought himself within the protection afforded to witnesses by the proviso to section 132 of the Evidence Act. His evidence was voluntarily given. Reference was, however, made to certain observations in *King-Emperor* v. *Nanda Gopal Roy* (3). There were special facts in that case. Nanda Gopal and others were placed on their trial before a Presidency Magistrate. Nanda Gopal was discharged. The other accused were convicted and appealed to this Court. This Court before disposing of the appeal directed that Nanda Gopal should be examined as a witness. No question was raised as to his competency, and his evidence was duly taken by the Magistrate and sent

(1) (1906) I. L. R. 33 Calc. 1353. (2) (1915) I. L. R. 42 Calc. 957, 986.
(3) (1916) 20 C. W. N. 1128, 1132.

1917

AKHOY KUMAR MOOKERJEE v. EMPEROR

up to this Court. Then the appeal of the other accused was dismissed, and the learned Judges at the same time issued a Rule upon Nanda Gopal to show cause why the case against him should not be further inquired into. The Rule was heard by the Chief Justice and Walmsley J., and in discharging the Rule the learned Chief Justice incidentally said that "the evidence of Mr. N. G. Roy, given under the direction of the Court, could not be used against him if he were to be retried." But the point was not decided and could not be decided at that stage. The Rule was discharged because it was considered unfair that the proceedings against Nanda Gopal should be revived upon the strength of statements made by him in the witness-box, in the course of an examination directed by this Court. The ground taken was quite independent of the further question whether those statements would or would not have been admissible against him supposing he were retried. Section 132 of the Evidence Act was not referred to, and, apart from that, the case is distinguishable from the present upon the facts. The case of an accused person who is discharged and then gives evidence and against whom an order for further inquiry is then made, may be subject to considerations which are not applicable to the present case. Upon that question we need express no opinion. In the present case we are unable to say that the Magistrate committed any error of law by admitting the appellant's deposition at Sheo Pershad's trial as evidence against him at his own trial.

It was lastly argued that the Magistrate could not properly find on the materials before him that the appellant "knew or had reason to believe" that the notes were stolen property. Reference was made to *Empress* v. *Rango Timaji* (1). No doubt mere

(1) (1880) I. L. R. 6 Bom. 402.

1917

AKHOY KUMAR MOOKERJEE v. EMPEROR.

carelessness or suspicion might not amount to criminal knowledge though the question might be one of degree. But in the present case the accused admits a dishonest mind. He says: "I did not know that the notes were stolen: I thought they were forged." There is nothing in the notes themselves to suggest that they were forged. We are of opinion that the evidence, including the statements of the appellant himself and the letter which he placed in his sister's custody, afford ample warrant for the finding that he knew or in fact believed that the notes had been stolen.

For the reasons given, this appeal must be dismissed. The appellant, if on bail, must surrender and undergo the remainder of his sentence.

E. H. M. *Appeal dismissed.*

CRIMINAL REVISION.

Before Richardson and Beachcroft JJ.

1917

Nov. 28.

MANHARI CHOWDHURI

v.

EMPEROR.*

Autrefois Acquit—Trial for theft and receiving stolen property charged in the alternative—Acquittal by the High Court—Subsequent trial under s. 54A of the Calcutta Police Act (Beng. IV of 1866) relating to the same act or series of acts—Act or possession punishable under s. 54A whether an offence—Criminal Procedure Code (Act V of 1898), ss. 4 (1) (o), 236, 237 and 403 (1).

Under s. 403 (1) of the Criminal Procedure Code an acquittal of offences under s. 380 and s. 411 of the Penal Code, charged in the alternative, bars a subsequent trial for an offence under s. 54 A of the Calcutta

* Criminal Revision, No. 1109 of 1917, against the order of K. B. Das Gupta, 4th Presidency Magistrate of Calcutta, dated Sep. 21, 1917.

1917

MANHARI CHOWDHURI v. EMPEROR.

Police Act (Beng. IV of 1866) in respect of the same act, or series of acts which formed the subject of the previous trial; the case falling within *Illustration* (*a*) of s. 236 and the *Illustration* attached to s. 237 of the Criminal Procedure Code.

Queen-Empress v. *Croft* (1) distinguished.

An act or possession punishable under s. 54 A of the Calcutta Police Act is an "*offence*" within s. 4 (*l*) (o) of the Code.

THE petitioner was a dealer in jute carrying on business at 115, Beniatola Street, in the town of Calcutta. One Jitmul Marwari had a jute godown at No. 141, Darmahata Street in charge of a sircar. On the 20th April, 1917, the latter was alleged to have locked the godown and gone away. Next morning, when the room was opened, it was discovered that there was some shortage of the jute stored there. Jitmul informed the police and went with them to the petitioner's godown. On search, eighty-three drums and two half bales of jute were found inside together with some gunny labels bearing certain marks. Two similar labels were discovered in a lane near a latrine of the building in which the petitioner's godown was situated. The complainant identified the jute and the labels as his. The petitioner was accordingly put on trial before Abdus Salam, the Third Presidency Magistrate, on charges in the alternative under ss. 380 and 411 of the Penal Code. He was convicted, on the 28th June, and sentenced to six months' rigorous imprisonment. The High Court, however, acquitted the petitioner, on 8th August, and directed the jute to be restored to him. He, thereupon, applied to the Magistrate who ordered the police to return the jute to him. On the 22nd August, he went to the Jorabagan thana where the same had been kept, took delivery and loaded them in five carts. As he was taking the carts away the police arrested him and

(1) (1895) I. L. R. 23 Calc. 174.

recovered possession of the jute. He was placed before K. B. Das Gupta, the Fourth Presidency Magistrate, who overruled his plea of *autrefois acquit*, on the 21st September, and proceeded with the trial. He thereupon obtained the present Rule from the High Court.

Babu Probodh Chandra Chatterjee, for the petitioner.

The Deputy Legal Remembrancer (*Mr. Orr*), for the Crown.

RICHARDSON AND BEACHCROFT JJ. This Rule was issued on the Chief Presidency Magistrate to show cause why certain proceedings taken against the petitioner under section 54 A of the Calcutta Police Act should not be quashed. The petitioner is a dealer in jute carrying on business at 115, Beniatola Street, Calcutta. It appears that he was found in possession of certain bales and half bales of jute. With reference to that jute he was placed on his trial before a Presidency Magistrate on charges framed in the alternative under sections 380 and 411 of the Indian Penal Code. He was convicted by the learned Magistrate in the alternative on those charges. He then moved this Court which set aside the conviction, and directed that the jute which was the subject matter of the charge, should be returned to him. Apparently he was removing this jute in five carts from the thana, where it had been stored, when he was again arrested, the jute being again seized, in order that the present proceedings might be taken against him under section 54 A of the Calcutta Police Act. That section runs as follows: "Whoever has in his possession, or conveys in any manner, or offers for sale or pawn anything which there is reason to believe to have been stolen or fraudulently obtained,

1917

MANHARI CHOWDHURI v. EMPEROR.

shall, if he fails to account for such possession or act to the satisfaction of the Magistrate, be liable to fine, etc., etc." The point taken before us on the petitioner's behalf is that, having been acquitted of the charges made against him at the previous trial, he cannot now be tried again for the offence created by section 54A which I have read. There is no doubt that the act or possession made punishable by section 54A is an offence within the definition in the Criminal Procedure Code by which "offence" includes any act made punishable by any law for the time being in force. Section 403 of the Code of Criminal Procedure enacts in its first paragraph that "a person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence, shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 236, or for which he might have been convicted under section 237." The question here is whether the petitioner is now to be tried on the same facts for an offence with which he might have been charged at the previous trial under section 236, or of which he might have been convicted at that trial under section 237. Section 236 provides that "If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences." For the present purpose section 237 carries the matter no further, and need not be more particularly referred

to. It is not disputed that the present proceedings relate to the same act or series of acts which were the subject of the previous trial. Mr. Orr, who has appeared for the Crown, does not deny that all the evidence which was relevant at the previous trial would be relevant on the present charge. The trial, in other words, will take place on the same facts, and it is not suggested that there are any additional facts to be placed before the Court. In that state of things we can see no reason why the accused should not have been charged at the previous trial, under the provisions of section 236, with the offence for which he is now being prosecuted. As I have stated, the present proceedings relate to the same act or series of acts to which the previous trial related, and it appears to us that before that trial it might have been said, in the terms of section 236, that it was doubtful whether the facts which could be proved would constitute theft, or receiving stolen property or an offence under section 54A of the Calcutta Police Act. If that be so, the case clearly falls within *Illustration* (*a*) of section 236 and the *Illustration* attached to section 237. Reference was made in the course of the argument to the case of *Queen-Empress* v. *Croft* (1). In our opinion that case is clearly distinguishable. The offences there in question were separate and distinct offences which were separately triable and punishable. It seems to us that the petitioner in the present case is about to be tried a second time on the same facts for an offence cognate to, or involved in, the offences with which he was previously charged. It is not suggested that if the previous conviction and sentence had been upheld by this Court, the petitioner could now be punished a second time under section 54A. The proceedings, therefore, come within

(1) (1895) I. L. R. 23 Calc. 174.

1917

MANHARI CHOWDHURI v. EMPEROR.

the prohibition contained in section 403 of the Criminal Procedure Code. In that view of the matter, the Rule must be made absolute and the proceedings quashed; and we direct accordingly.

With regard to the jute, we direct that it be re-delivered to the petitioner.

E. H. M

Rule absolute.

PRIVY COUNCIL.

RADHAKANT LAL

v.

NAZMA BEGUM

(AND ANOTHER APPEAL CONSOLIDATED).

P.C.
1917

Nov. 1, 2, 5 ;
Dec. 14.

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Hindu law—Joint family—Mitakshara law—Managing member blending accounts of self-acquired property and joint property—Mutual exchanges on "deorh" partition of joint property for self-acquired property—Deeds of gift of joint ancestral property set aside.

Three brothers were members of a Mitakshara joint family, *D* being the managing member and guardian of *K* who was a minor. The family property consisted partly of joint property, and partly of property which came to them from the estate of a deceased brother. Only one account book was kept for the joint shares of the latter property, and that system of book-keeping which began in October, 1878, was continued till February, 1880, when *K* came of age. No separate book was thereafter kept by or for *D* in respect of the property which had come to them from their brother's estate ; but there was one account for all *D's* receipts from all sources whether it was income from the joint family property, or from that which had been acquired from the brother's estate, or any other sort of revenue, and similarly for all his expenditure of whatsoever kind. Further, on "a deorh" partition, that is, an actual partition of the several properties constituting their estates, mutual exchanges were made whereby *D* gave up his share in some ancestral family property for the share of *K* in the property acquired from the brother's estate. In a suit by *D's* son and grandsons (the appellants) after the death of *D* to set aside deeds of gift made by *D* in favour of the respondents, on the ground that they had been made out of the joint ancestral property, and were therefore invalid:—

Held (reversing the decision of the High Court), that the property coming from the brother's estate to the members of the family as collateral

* *Present :* LORD BUCKMASTER, SIR JOHN EDGE, SIR WALTER PHILLIMORE, BART., AND SIR LAWRENCE JENKINS.

1917

RADHAKANT LAL v. NAZMA BEGUM.

heirs was self-acquired property; that by blending that property with the joint property in the accounts, and by the mutual exchanges made on the partition, *D* had thrown it into the common stock, and thereby converted it into ancestral family estate. All the properties purporting to be conveyed to the respondents by the deeds of gift were joint family properties over which *D* had no power of disposition, and the appellants were entitled to recover them.

Suraj Narain v. *Ratan Lal* (1) followed.

Two consolidated appeals (14 and 15 of 1917) from a judgment and three decrees (2nd June 1913) of the High Court at Calcutta, which mainly reversed a judgment and two decrees (8th April 1909) of the Court of the Subordinate Judge, Gaya.

The plaintiffs were the appellants to His Majesty in Council.

The main dispute was as to the validity of two deeds of gift executed by one Drigpal, deceased, in favour of the Musammat respondents.

Drigpal was the father of the first appellant, and the grandfather of the second, third, and fourth appellants, the family was admittedly governed by the Mitakshara law, and at the date of the gifts (27th May 1905) Drigpal and the appellants were joint. If the subject matter of the gifts was joint property, as presumably it would be and as the appellants contended it was, the gifts were clearly invalid; but the respondents' case was that it was self-acquired and not joint.

For the purpose of this report, the facts of the case are sufficiently stated in the judgment of their Lordships of the Judicial Committee.

The appellants' contention was that the property was joint for two reasons: (*a*) because it had been acquired by means of the family funds, (*b*) even if it was wholly self-acquired, Drigpal as manager of the

(1) (1917) I. L. R. 40 All. 159; L. R. 44 I. A. 201.

joint family dealt with it in such a manner as to throw it into the common stock of the joint family.

The appellants succeeded on both these points before the Subordinate Judge; and they failed on both points in the High Court (Chitty and Teunon JJ).

ON this appeal, which was heard *ex parte*,

DeGruyther, *K.C.*, and *Sir William Garth*, for the appellants, contended that Din Dayal's properties were not collaterally inherited by the three brothers, but were acquired for valuable consideration in pursuance of a family arrangement and as joint property. On a proper construction of the documents executed on 3rd April 1878, and on the evidence in the case, the properties in suit came to the three brothers as joint family property of the three branches of which they were respectively *kartas*. In any case Drigpal's share of the consideration was paid out of joint funds, and his share of the properties was, therefore, acquired for the benefit of, and became the property of the joint family of which he was the *karta* and trustee. Even if Drigpal's share of the properties was originally self-acquired, the evidence showed that he subsequently amalgamated it with the joint properties and threw it into the common stock. The properties in suit other than those admittedly forming part of Drigpal's estate must be presumed to be joint in the absence of evidence to the contrary; and in any case the evidence showed that they were acquired from joint funds [*Sir Lawrence Jenkins.* The only question is whether Drigpal obtained the property by purchase or by inheritance.] That is so. Reference was made to *Lal Bahadur* v. *Kanhaiya Lal* (1) and *Suraj Narain* v. *Ratan Lal* (2).

(1) (1907) I. L. R. 29 All. 244, 255; L. R. 34 I. A. 65, 70.

(2) (1917) I. L. R. 40 All. 159. L. R. 44 I. A. 201.

1917

RADHAKANT LAL v. NAZMA BEGUM.

The judgment of their Lordships was delivered by SIR WALTER PHILLIMORE, BART. The suits to which these consolidated appeals relate concern the validity and effect of two deeds of gift made by one Drigpal Lal, deceased, the father of the first plaintiff and appellant, and grandfather of the other plaintiffs and appellants, in favour of two concubines and the daughter of one of them.

The son asserts that he and his father were joint members of a Hindu family, and that the properties to which the gifts relate were part of the joint family estate. This is the question to be determined in the suit.

Some of the properties in question came to Drigpal from the estate of his brother, Din Dayal, and others were acquired by the use of the revenues of Din Dayal's estate; and the first matter to be enquired into is whether the property which came to Drigpal from Din Dayal's estate was self-acquired property or came to him as part of the joint family estate.

The circumstances in which it was acquired are as follows :—

Drigpal and Din Dayal were two of five brothers who were at one time all members of a joint Hindu family. Din Dayal was adopted by his uncle and went out of the family. Another brother died without male issue. This left Duli Chand, Drigpal, and Kanhaya.

These three brothers separated in estate in the year 1876.

Din Dayal died on the 8th March, 1878, leaving no issue, but leaving surviving him his widow, Rukmini, and two widows of his adoptive father.

The succession to his estate if he died intestate would therefore be as follows :—

The widow Rukmini would take for her life, giving maintenance to the other widows. These if

they survived her, would take for their lives (it matters not for this purpose in which order *inter se*), and then those who at the death of the survivors of the three widows would be the male heirs would take the property. At the moment of Din Dayal's death there would be the three brothers; but it could not be foreseen who would be the male heirs when the succession ultimately devolved upon them. Din Dayal, though he made no legal will, expressed his last wishes as to the disposal of his estate, and they were, according to the recital in an *ekrarnama*, dated the 3rd April, 1878, and executed by the widow, to the following effect:—

"that after my death you" (that is, Duli Chand and Drigpal) "and Babu Kannaya Lall shall, as proprietors, enter upon possession of all my properties, movable and immovable, all mortgage and simple bonds, all decretal moneys, zarpeshgi moneys and Bhurna moneys, houses and money at Ramna situated in Sahebgunge, zillah Gaya, and over every other kind of properties belonging to me; that you shall allow my wife to remain during her lifetime in possession of my dwelling-house situated in Kasba Haswa . . .; that you shall pay to her one-lakh of rupees in cash to defray the expenses of performing religious rites and pilgrimage, from your own pocket; that you shall allow all money in cash and ornaments which are in the house at Haswa to remain in the possession of the Mussummat during her life; that you shall pay her rupees ten thousand in cash annually, besides clothing and grains sufficient for her use; that you shall pay to Mussummat Jado Koer and Dhupa Koer, the widows of Babu Murali Ram, who are my mothers, rupees 2,500 each annually in cash, besides clothing and grains sufficient for their use; that you shall make a hiba or gift to Mussummat Rama Koer, daughter of Babu Girdhar Lal, my deceased brother, of 16 annas of mouzah Lodipur Jafra and Shaikhpara appertaining to Lot Lodhipur Jafra, 16 annas of mouzah Korigawan appertaining to Lot Sandha Manjhigawan . . . . and 16 annas of mouzah Kumharwa Girzi Bandbanna appertaining to Lot Samandih, etc, being 12 kalams known as mahal Ratni . . . . with all the dependencies and all the chucks of the mouzah aforesaid, situate in zillah Gaya; that you shall pay rupees 1,300 in cash annually, and clothing and grains sufficient to meet her requirements, to Mussummat Annapurna Tawaif, provided that she does not lose her chastity and character and continue in the Pardah; that you shall make gift to

1917

RADHAKANT LAL v. NAZMA BEGUM.

Babu Somar Ram of 16 annas of mouzah jatsari . . . ; and that you shall execute deeds in accordance with the above directions in favour of these persons."

All parties were desirous that these wishes should be carried into effect, and accordingly a series of documents were executed, the first being the *ekrarnama* already mentioned whereby the widow purported to dispose of all the property of her deceased husband in favour of the three brothers.

Then there was a bond given by the brothers to the widow with a mortgage, to secure the payment of the lakh of rupees; a covenant, with a charge on certain property, to pay to the father's widows the stipulated annuities and maintenance; a covenant with the concubine to pay her the agreed annuity and maintenance; a deed of gift in favour of the adopted nephew; and a similar deed of gift in favour of the niece.

The lakh of rupees was paid in two instalments within six months of the death, and the bond was discharged. The money found to pay Rukmini by the three brothers came out of ancestral family property.

The three brothers entered into possession of the estate, and paid the annuities and maintenance to the various ladies. The father's widows died first, and then Rukmini in the course of the year 1882.

The annual income of the property is said to have been rather more than half a lakh, so that the arrangement, as it turned out, was not such a bad bargain for Rukmini, and was advantageous to the father's widows. For the concubine, niece, and adopted nephew it was pure gain.

It was contended on behalf of the defendants that the *ekrarnama* of the 3rd April, 1878, executed by Rukmini in favour of the three brothers was inoperative to pass more than her life interest, and that the

brothers who survived her must be deemed to have taken the property by inheritance, in which case, being an inheritance from a collateral, it would be self-acquired, and not to have taken it by purchase, in which latter case it would be ancestral family property.

That it was the intention of the deed to pass the whole property is obvious. If Rukmini was only conveying her life interest, and if either of the father's widows had survived her, the survivor's estate would have been interposed before that of the brothers. Even if it be supposed that the father's widows were so far parties to the transaction that they could not have claimed their life interest in the event of their surviving Rukmini, there was, as already observed, no certainty that the three brothers would have all survived Rukmini, so as to be the heirs at her death. Moreover, the gifts in favour of the adopted nephew and niece would have failed.

It may be, however, that though this was the intention of the deed, its only legal operation would be the restricted one for which the defendants contend.

A widow has only a limited power of disposition of the property. She can, however, alienate the estate in certain circumstances and under certain conditions. Whether in the circumstances of this case she could effect a valid alienation is a matter of some difficulty. The Subordinate Judge thought that she could; the High Court held that she could not.

Their Lordships are relieved from pronouncing upon this point of law, because they are of opinion that as regards the property which came from Drigpal the plaintiffs can succeed upon another ground.

Assuming that the three brothers—and in particular Drigpal—acquired this property as collateral

1917

RADHAKANT LAL v. NAZMA BEGUM.

heirs, and took it therefore as self-acquired property, it is well established that a member of a Hindu family may convert his self-acquired property into ancestral family estate by throwing it into the common stock; and this is, in their Lordships' opinion, that which happened in the present case.

As already stated, Drigpal and his two brothers had made a partition of their joint family estate in 1876. At the time of the death of Din Dayal and the accession of the three brothers to his property, Drigpal was acting as guardian of his younger brother Kanhaya. Accordingly one book was kept for their joint share of Din Dayal's estate; and this system of book-keeping, which started on the 2nd October, 1878, was continued till the 11th February, 1880, when Kanhaya came of age. Thereafter no separate book was kept by or for Drigpal in respect of the property which had come to him from Din Dayal; but there was one account for all Drigpal's receipts from all sources, whether it was income from joint family property, or from that which he had acquired from Din Dayal, or any other source of revenue, and similarly for all his expenditure of whatever kind.

Now his son, Radhakant Lal, the first plaintiff and appellant, had been born on the 31st May, 1877, and from that time forward there had been a joint family estate for him and his father. And, if the accounts from 1880 onwards are such as to show a blending of the properties, the ordinary inference to be drawn is that Drigpal had thrown the property which he had acquired from Din Dayal into the common stock.

This matter has come more than once before this Board, and was the subject of decision in the cases of *Lal Bahadur* v. *Kanhaiya Lal* (1) and *Suraj Narain*

(1) (1907) I. L. R. 29 All. 244; L. R. 34 I. A. 65.

v. *Ratan Lal* (1), decided on the 30th January, 1917.

The Subordinate Judge held that Drigpal had amalgamated the two properties, and the two grounds upon which his decision to this effect is supported by the present appellants are :—

First, the intermixture of and the blending of the receipts and payments in one account with those belonging to the ancestral family property ;

And, *secondly*, that when Drigpal and his younger brother Kanhaya took the further step of effecting what is called "a deorh partition," that is, not merely a separation of interest, but an actual partition of the several properties constituting their estates, mutual exchanges were made whereby Drigpal gave up his share in some ancestral family property for Kanhaya's share in property which came from Din Dayal, and *vice versâ*.

The High Court took the opposite view. As to the argument drawn from the exchange, the judgment of the High Court is as follows :—

"The first point made was with regard to the *deorh* partition which took place between Drigpal Lal and Kanhaya Lal on the 8th May, 1881. It was argued that, on that partition, Din Dayal's properties were exchanged for joint properties and *vice versâ*, When, however, this point came to be investigated it appeared that there was no such general interchange as the plaintiffs would have us believe. Only two possible instances were given us, and of these one is capable of an obvious explanation and the other is not fully proved. The first instance was with regard to mouzahs Sikandarpur and Asarhi. It is doubtless the case that mouzah Sikandarpur was ancestral while mouzah Asarhi had come from Din Dayal. These mouzahs are contiguous and of equal value so far as one can tell from the *jama*. They both form part of mahal Asarhi-Sikandarpur. At the partition it seems that Drigpal took 10 annas 8 pies of Sikandarpur, while Kanhaya Lal took 10 annas 8 pies of Asarhi, so that each brother got two-thirds of a separate village instead of a one-third share in the two. This clearly was a matter of convenience and cannot, we think, be regarded

(1) (1917) I. L. R. 40 All. 159 ; L. R. 44 I. A. 201.

1917

RADHAKANT LAL v. NAZMA BEGUM.

as evidence of amalgamation of properties ancestral and acquired from Din Dayal. Neither of these villages, it may be observed, forms part of the subject-matter of the present suit.

"Then it was said that for mouzah Pillich, touzi No. 204, and ancestral mouzah, two mouzahs, Nanand and Sonchari, which came from Din Dayal, were exchanged. For this the evidence is Exhibits 45 and 47, application made by Drigpal Lal, and Exhibit 64, an application made by Kanhaya Lal, for mutation of names. The exchange of these villages does not appear to have been very satisfactorily established from these two Exhibits. In the abcence of any *koras* or other reliable evidence as to the precise details of this partition, it would be impossible to draw the conclusion which the plaintiffs wish us to draw from the very meagre evidence with regard to these two exchanges."

It should be observed that the High Court agrees with the Subordinate Judge in respect of the exchange of Sikandarpur and Asarhi; and their Lordships are of opinion that the exchange of Pillich for the two mouzahs specified was satisfactorily proved by the documentary evidence. This evidence was further supplemented by the oral evidence of the witness Gajadhar Lal. Moreover, there was oral evidence uncontradicted from this witness and from Bhekhi Lal, proving the exchange of two more villages. A more striking proof of the throwing together of the two properties into a common stock there could hardly be.

Drigpal gives ancestral family property, and receives his brother's share in property coming from Din Dayal. He gives Din Dayal property and receives his brother's share of ancestral family property.

There is not only one case which standing by itself could with difficulty be explained away; but there are four instances.

Turning now to the accounts, the Judges of the High Court agree that, from and after the "deorh partition" in 1881, Drigpal's accounts were undoubtedly more or less mixed up. But they observe that

Drigpal had five *tehbils* or tills. The judgment then proceeds as follows :—

"We have been taken through the accounts at great length by the learned counsel for the respondents, and we do not think that it is possible to draw any very definite conclusion from these accounts ; *first*, because a large number of the accounts which were kept by Drigpal or under his direction, relating to his estate, have not been produced ; and, *secondly*, because the plaintiff Radhakant, who alone could speak with authority as to these accounts, and their precise object and nature, has not ventured to go into the box. All the papers which were in the possession of Drigpal at the time of his death have passed to Radhakant, and the fact that he has not produced so many of them must weigh very strongly against him. There is no one general or central account which shows that the whole of Drigpal's estate was dealt with as a unit. In particular, we may mention that with the exception of Exhibits 16 and 18 no books of account of the mica mining business—either the Seha books at the mines or the stock books—are forthcoming. None of the 'Khazana haveli' or of the Calcutta books have been produced, nor have any books after 1308. In 1304 certain mouzahs acquired after the death of Din Dayal, and in 1310 certain of the Din Dayal villages, were set apart for the pocket expenses of Drigpal, and in 1309, it is said, a certain ancestral village was set apart for the pocket expenses of Radhakant. In respect of the village set apart for Drigpal, separate accounts were admittedly kept. None of these books have been produced. The *tamasuki tahis* dealing with bonds and money-lending business are not forthcoming, nor the books of the mail-cart business. The learned counsel for the respondents attempted to minimise the effect of this non-production of books ; but it is, in our opinion, a very serious matter. If all the books of Drigpal had been produced, it might have been possible to ascertain precisely how his accounts were kept and with what object."

The plaintiffs are said not to have produced the books of the general account already mentioned, which was begun on the 11th February, 1880. The books of the general account were produced to about the end of the year 1892. The explanation offered of the non-production of the later books is that after 1892 they were thought to be of no importance, because all the properties which Drigpal bought had been acquired by this time, and the only object of producing the accounts after the first year or two was to show that

1917

RADHAKANT LAL v. NAZMA BEGUM.

these properties had been bought out of the common stock, and therefore formed part of it.

This is not strictly accurate, for one property at least was bought after 1892. But once given that the account shows that the properties had been blended, the later accounts are, for this purpose, immaterial. Properties once brought into a common stock cannot be taken out of it again.

Then, as to the statement that "there is no one general or central account which shows that the whole of Drigpal's estate was dealt with as a unit," their Lordships cannot accept this as accurate.

The account already so often mentioned purports to be a general account, into which all receipts and payments are brought. It might, perhaps, be said that it is only a cash-book and not a ledger. But it appears to be a similar book to that which was produced to the Board in the case of *Suraj Narain* v. *Ratan Lal* (1) as to which their Lordships observed: "It is not strictly an account book at all, but a book in which is recorded from day to day various payments and receipts of money from different sources"; and from which their Lordships drew the inference in that case that the man who kept the account had "so blended his own property with the joint property as to make the whole joint property."

As to the non-production of the *khazana haveli*, their Lordships cannot see what assistance the production of these books, if, indeed, such are kept, would have been.

No doubt the plaintiff, Radhakant, did not give evidence; but the men of business of the family did. And it does not appear that any point was made in cross-examination or in the conduct of the trial, that

(1) (1917) I. L. R. 40 All. 159; L. R. 44 I. A. 201.

any material books had been kept back; and no such idea seems to have occurred to the Subordinate Judge.

There remains one piece of evidence which makes in favour of the respondents, and that is furnished by the recitals in the two deeds which are attacked by the present suits. They are in similar terms and are as follows:—

"My income from ancestral properties was only 13,000 rupees, but subsequently I got the estates of Babu Girdhari Lal and Babu Din Dayal Lal, yielding an income of 29,000 rupees. After my separation from Babus Dulichand and Kanhayalal, I acquired lots of properties by my own labour and exertions and from my own fund, by means of trade, and the 'ticca' (meaning a ticca lease of Dourchanch, which by making improvement now yields an income of 38,000 rupees). In this way I am now possessed of four kinds of properties, viz.—(1st) The ancestral properties; (2nd) The estate of Babu Girdhari Lal; (3rd) The estate of Babu Din Dayal Lal; and (4th) The self-acquired properties; with regard to which I have full powers of transfer."

The effect of these recitals, which were probably intended to make evidence, is somewhat weakened by the fact that in a deposition made in another suit, Drigpal stated that a property which he gave to a son by one of these concubines, named Sultan Bahadur, had been given with the consent of his lawful son, the plaintiff Radhakant; and this property came from Din Dayal.

Their Lordships cannot attach sufficient countervailing weight to these recitals to displace the strong evidence from the exchanges and the accounts; and upon the whole, they come to the conclusion that, assuming that Drigpal acquired his share of the property of his brother Din Dayal as self-acquired property, he so dealt with it afterwards as to make it joint property with his ancestral family estate, of which family, the first plaintiff and, as they were born, the other plaintiff were members.

1917

RADHAKANT LAL v. NAZMA BEGUM.

Turning now to the deeds of gift which are attacked by the plaintiffs in the present suits, the four properties purported to be conveyed to Mussummat Nasiban, which are the subject-matter of the second suit, were properties which form part of the estate of Din Dayal, and therefore could not be conveyed away from the joint family estate.

As to the properties purported to be conveyed to Mussummat Nazma Begum and her daughter, the matter is more complicated. There are thirteen properties: two appear to have come from Din Dayal, the rest appear to have been bought by Drigpal at various times after Din Dayal's death.

Drigpal had a nucleus of joint family property, the income of which was nearly half a lakh. He carried on for some years a business of extracting and selling mica, as he says in the recitals in the deeds of gift; and he also claims to have carried on a profitable mail-cart business.

It was suggested for the respondents and accepted by the High Court that the profits of these two businesses and the properties purchased with them might be considered self-acquired. But in one instance certainly the land from which the mica was extracted was ancestral family property. It appears also from some of the books which have been produced that the moneys paid for wages and other expenses of winning the mica were supplied out of the general income of Drigpal, and that the profits were—as the Subordinate Judge has found—devoted to the general maintenance of the family and the education of the son Radhakant. From whatever source some of the lands from which the mica was gotten may have been acquired, the mica business was dealt with as part of the joint family property.

As to the mail-cart business, it was doubtful whether there were any profits ; and the receipts and payments in connection with it were all brought into the one general account.

The final result, therefore, is that all the properties purporting to be conveyed to the respondents were joint family property of which Drigpal could not so dispose, and that the plaintiffs and appellants are entitled to recover them from the respondents, that is, the two concubines, and the daughter of the one, and the mortgagees.

It is right to say that their Lordships were informed by counsel at the Bar that so far as the deeds of gift purported to pass personal property, they are not to be deemed to be attacked in the present suits, and that the recovery is to be limited to the lands.

The Subordinate Judge only gave a judgment in respect of five-sixths of the property, taking it that, at the time of Drigpal's death, there were six members of the family, namely, Drigpal himself, Radhakant, and the latter's four sons, and being of opinion that Drigpal had therefere one-sixth share in the properties which he could pass by the deeds of gift.

This, however, is an error. Drigpal had no separate sixth share. The whole property belonged to the one Hindu family, and accrued upon his death to the surviving members.

The plaintiffs appealed in respect of this matter to the High Court, and their Lordships are of opinion that their appeal should have been allowed.

Their Lordships will, therefore, humbly advise His Majesty that these appeals should be allowed ; that the judgment of the High Court should be reversed ; that the judgment of the Subordinate Judge should be varied by declaring that the plaintiffs have right to the whole, and should get possession of the whole of

1917

RADHAKANT LAL v. NAZMA BEGUM.

the landed properties covered by the two deeds of gift, instead of five-sixths only, and that it, so varied, should be restored; and that the plaintiffs should have their costs in the High Court, and on appeal to His Majesty in Council.

The judgment of the Subordinate Judge decreeing that each party should bear his own costs of the proceedings before him should be allowed to stand.

J. V. W. *Appeals allowed.*

Solicitors for the appellants: *Heath & Hamilton.*
Solicitor for the respondent: *Edward Dalgado.*

PRIVY COUNCIL.

---

*P. C.**
1918

Feb. 1.

GANGA PERSHAD SINGH

v.

ISHRI PERSHAD SINGH.

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Mortgage—Transfer of Property Act (IV of 1882), s. 9—Execution of mortgage by pardanashin lady, attestation of—Requirements as to identity of executant and as to witnesses seeing actual execution of deed—Acknowledgment of her signature by executant.

On a question whether a mortgage sued upon had been properly attested under the provisions of section 59 of the Transfer of Property Act (IV of 1882), the evidence showed that the attesting witnesses had not, though present, seen the executant (a *pardanashin* lady) sign the deed, but had subsequently to the execution received from her son, who had been with

* *Present*: VISCOUNT HALDANE, SIR JOHN EDGE, MR. AMEER ALI AND SIR WALTER PHILLIMORE, BART.

her on the other side of the *pardah*, an acknowledgment that the signature on the deed had been made by his mother :—

Held (reversing the judgment of the High Court), that the requirements of section 59 had not been complied with, and the deed was, therefore, invalid as a mortgage.

Shamu Patter v. *Abdul Kadir Ravuthan* (1) and *Padarath Halwai* v. *Ram Nain Upadhia* (2) distinguished.

APPEAL 61 of 1913 from a judgment and decree (August 12th, 1909) of the High Court at Calcutta, which reversed a decree (31st May, 1907) of the Subordinate Judge of Darbhanga.

The fourth defendant was the appellant to His Majesty in Council.

For the purpose of this report the facts are sufficiently stated in the judgment of the Judicial Committee. The suit which gave rise to the appeal was brought to enforce a mortgage bond dated 23rd August 1893. The only question material to this report was whether the bond had been duly "attested" as required by section 59 of the Transfer of Property Act (IV of 1882). This precise point was not raised on the pleadings but arose incidentally in connection with an issue that the suit was barred by limitation. As to that the Subordinate Judge said, "The time for repayment of the debt was stipulated to be within six months from the date of the bond. The time of six months so fixed ended on 23rd February, 1894, and from that date the period of limitation must have begun to run. To enforce the mortgage-charge created under the limitation was twelve years from the due date, and to obtain a personal decree for a money-debt under the bond the limitation was six years from that date. The suit on the bond was instituted on 23rd February, 1906, that is to say, after a lapse of six years

(1) (1912) I. L. R. 35 Mad. 607 ; L. R. 39 I. A. 35.

(2) (1915) I. L. R. 37 All. 474 ; L. R. 42 I. A. 163.

1918

GANGA PERSHAD SINGH v. ISHRI PERSHAD SINGH.

from the due date, and within twelve years from it. It is evidently clear, therefore, that if the bond was not valid as creating a mortgage charge the entire suit of the plaintiffs would be barred by limitation. The question, therefore, arises whether the bond in suit can operate as a mortgage-bond. The defendant No. 4 (Rai Ganga Pershad Singh) contends under section 59 of the Transfer of Property Act, that "the execution of the bond not having been duly attested as required by that section it cannot operate as a mortgage bond."

And the Subordinate Judge went on to hold that on the evidence the document sued on had not been duly attested, and for that reason was inoperative as a mortgage. He accordingly dismissed the suit.

An appeal to the High Court was heard by H. L. STEPHEN and DIGAMBAR CHATTERJEE JJ., who reversed the decision of the Subordinate Judge and held that the execution of the bond had been "duly attested" under section 59 of the Transfer of Property Act. On this point they said in their judgment, "The facts seem to be that the attesting witnesses were on one side of the *pardah* when the deed was executed, and the executant on the other. Her son, Balmukund, seems to have taken the deed behind the *pardah* and to have come back with it signed. It has not been suggested that Mussummat Sharbat did not in fact sign the deed. On these facts we cannot hold that the deed was not attested, merely because the witnesses did not see the executant sign. The case seems very similar to that of *Harmongal Narain Singh* v. *Ganaur Singh* (1), so far as the facts are disclosed in the judgment of Brett J., except indeed that there was then specific evidence of a witness who saw the lady sign. Here there is none, but it is impossible to

(1) (1907) 13 C. W. N. 40.

doubt that the attesting witnesses were satisfied by Balmukund that the deed was signed by his mother. On appeal, the judgment of BRETT J. was upheld on the ground that there was no evidence that the attesting witnesses did not see the executant; but BRETT J.'s judgment seems to have been passed on the assumption that they did not. Whatever may be the correct view to be taken of this decision, we must hold that there was due attestation in this case. To hold otherwise would be to upset what we believe is a frequent practice in cases of the execution of deeds by *pardanashin* ladies, and in many cases to make attestation of their signatures almost impossible."

The High Court, accordingly, allowed the appeal and gave the plaintiffs a decree.

On this appeal,

De Gruyther, K.C., Kenworthy Brown and *H. N. Sen*, for the appellant, contended that the alleged mortgage was not duly attested under the provisions of section 59 of the Transfer of Property Act, and was therefore invalid as a mortgage. No witness saw the lady sign the deed: and the requirements of section 59 not having been complied with, the case, it was submitted, was concluded by the decisions of the Board in which it was held that it was necessary that the attesting witnesses should see the executant put her signature to the document. Reference was made to *Shamu Patter* v. *Abdul Kadir Ravuthan* (1), and *Padarath Halwai* v. *Ram Nain Upadhia* (2). The decision of the Subordinate Judge was therefore and had been wrongly reversed by the High Court.

(1) (1912) I. L. R. 35 Mad. 607; L. R. 39 I. A. 35.

(2) (1915) I. L. R. 37 All. 474; L. R. 42 I. A. 163.

1918

GANGA PERSHAD SINGH v. ISHRI PERSHAD SINGH.

A. M. Dunne, K.C., for the respondent. No issue on this precise point was raised, but the question arose incidentally on a point of limitation, and the suit would be barred unless the document was a valid mortgage when the period of limitation would be extended from 6 to 12 years. There is evidence that the lady executed the deed and that the attesting witnesses were present, but they were on one side of the *pardah*, and she was on the other. The case of *Shamu Patter* v. *Abdul Kadir Ravuthan* (1) decided that an attesting witness must be present and see the execution; in the present case the witnesses were present and did not actually see the deed signed, but subsequently to the execution they received an ackowledgment of the deed having been duly signed by the proper executant. If that is not sufficient, the case should be remitted to India and an issue raised on the decision of which the present case might be brought within the case of *Padarath Halwai* v. *Ram Nain Upadhia* (2). There had been a change in the view taken of section 59 by the Courts and at the time the present case came up on appeal in India a case had come before the High Court in which it had been decided that it was not necessary an attesting witness should actually see a *pardanashin* lady sign the document.

The appellant was not called on to reply.

Feb. 1.

The judgment of their Lordships was delivered by VISCOUNT HALDANE. This appeal arises out of a suit which was brought by one Ishri Pershad and others to enforce an instrument of mortgage, dated in 1893, against the present appellants and others. The whole question before their Lordships turns, in the

(1) (1912) I. L. R. 35 Mad. 607; L. R. 39 I. A. 35.

(2) (1915) I. L. R. 37 All. 474; L. R. 42 I. A. 163.

first instance, upon the validity of the instrument of mortgage which is sought to be enforced. It is argued on behalf of the appellants that the mortgage was invalid because it was not executed in the manner rendered necessary by section 59 of the Transfer of Property Act, 1882. Section 59 enacts that: "Where the principal money sum secured is 100 rupees or upwards, a mortgage can be effected only by a registered instrument signed by the mortgagor, and attested by at least two witnesses." Now the question is: What is meant by the word "attested"? In the present case, all that is proved is that the mortgage was executed under circumstances which their Lordships will state very shortly. It was granted by a lady called Mussummat Sharbat Koer, who was the guardian of her son Balmukund Das, and she executed the mortgage on his behalf. She was a *pardanashin* lady, and the account given by the respondents' own witnesses of what happened was this: She was behind the *pardah* when the document was taken to her for signature; none of the witnesses saw her sign it; her son came from behind the *pardah* and said that it had been signed by her. That was all. The question is whether the witnesses who appended their names under these circumstances attested the document in accordance with the provisions of section 59. Now at one time there seems to have been a good deal of difference of opinion as to what "attested" meant. It will be observed that the words are not "attested and acknowledged," as is the case in some statutes, but "attested" only. At the time this appeal was decided by the High Court, this Board had not decided the case of *Shamu Patter* v. *Abdul Kadir Ravuthan* (1). In that case it was held, settling the law as to the interpretation of the words to which their Lordships

(1) (1912) I. L. R. 35 Mad. 607; L. R. 39 I. A. 35.

1918

GANGA PERSHAD SINGH v. ISHRI PERSHAD SINGH.

have referred in section 59, that the section is not complied with if the witnesses have not been present at the execution of the instrument and have only attested on the subsequent acknowledgment of the signature. After that there was another case brought before this Board, which was relied on by the respondents as bringing the point in the present case, at any rate, much nearer. It was a case of *Padarath* v. *Ram Nain Upadhia* (1). The head note is as follows :—

"A mortgage deed purported to be executed by two *pardanashin* ladies. It appeared from the evidence of two of the attesting witnesses that they saw the hand of each executant when she signed the deed, and that, although they could not see the faces of the executants, they heard them speak and recognised their voices."

That is a very different case from a case of attesting on mere subsequent acknowledgment. It is a case in which the witnesses actually saw the hand of each lady, and in which they recognised her voice, and it is plain that, in the case of witnesses who were acquainted with the individuality of the lady concerned, they might very well recognise the hand which guided the pen and the voice sufficiently to be able to swear to the identity of the person who was performing the act. But that is a very different case from the one before their Lordships upon the present occasion, where, not only was the actual attestation not witnessed by a hand put out from behind the curtain, but the voice was not heard, and what the witnesses went on was, in the main, the fact that the son came to them and said: "Here is the deed which my mother has executed." That, in their Lordships' opinion, is not enough to satisfy the terms of the statute. The mortgage is therefore void, and the appeal must succeed.

(1) (1915) I. L. R. 37 All 474 ; L. R. 42 I. A. 163.

It has been suggested that the appeal should be referred back to the Court below, on the view which their Lordships take of the law (and it is a view which may be said to have been a somewhat novel one at the time of the decision of the High Court in Calcutta, given in 1909, three years before the first decision of the Judicial Committee to which their Lordships have referred), for the purpose of framing an issue to see whether it could be brought within the later decision about *pardanashin* ladies. But it is obvious that the facts, as proved here, fall far short and very remote from what was under consideration in the case to which reference has been made, and their Lordships see no justification for taking the unusual course of referring back an appeal which has been argued, and which ought *primâ facie* to be decided upon the materials which were before the Courts below.

Their Lordships will, therefore, humbly advise His Majesty that the appeal should be allowed, and that the respondents should pay to the appellants their costs here and in the Courts below.

J. V. W. *Appeal allowed.*

Solicitors for the appellants: *T. L. Wilson & Co.*

Solicitors for the plaintiffs-respondents: *Ranken Ford & Chester*

APPELLATE CIVIL.

Before Sanderson C. J. and Mookerjee J.

1916

March 16.

BHUSHAN CHANDRA GHOSE

v.

SRIKANTA BANERJEE*.

Landlord and Tenant—Adverse possession—Title—Under-tenant—Purchase of tenancy by auction-purchaser—Incumbrance—Notice of annulment proceedings—Bengal Tenancy Act (VIII of 1885) ss. 161, 167.

When a person has, by adverse possession against a sub-tenant, acquired a statutory title to a portion of the lands comprised in the sub-tenancy, he has an interest in the sub-tenancy, so that when on a sale of the superior tenancy for arrears of rent, the purchaser seeks to annul the sub-tenancy as an "incumbrance," such person stands in the position of an "incumbrancer", and is entitled to notice under section 167 of the Bengal Tenancy Act.

SECOND APPEAL by Bhushan Chandra Ghose and Jatindra Mohan Ghose, the defendants Nos. 1 and 2.

One Baikunta Nath Mukherji and others were co-sharer *mokararidars* of a certain *jama* in the name of Amir Ali Chowdhury situate within the *mal* lands of the village Kalyanpur and appertaining to the *taluk* of Tara Prasanna Changdar. On the 27th August, 1886, the *mokararidars* created a *dur-mokarari* tenure in favour of one Ganga Narain Pal in respect of their entire *jama* and realised from him the entire rent for the same. Some time prior to 1889, the *dur-mokararidar* settled $2\frac{1}{2}$ bighas out of the lands comprised in the *jama* with one Goberdhan Sheikh and received rent from him for the portion settled. Goberdhan

* Appeal from Appellate Decree, No. 2459 of 1914, against the decree of Jadab Chandra Bhattacharjee, Subordinate Judge of Burdwan, dated May 16, 1914, confirming the decree of Narendra Nath Ghose, Munsif of that place, dated March 31, 1913.

Sheikh, thereafter, attorned to Bhushan Chandra Ghose and Jatindra Mohan Ghose in respect of the 2½ bighas and paid rent to them instead. In 1889, Ganga Narain Pal brought a suit against Goberdhan Sheikh, Bhushan Chandra Ghose and Jatindra Mohan Ghose for recovery of possession of the 2½ bighas; but this suit was dismissed and Goberdhan remained, thereafter, in adverse possession and continued to pay rent to the landlord he had attorned to. In 1902, Tara Prasanna Changdar instituted a suit against the *mokararidars* for arrears of rent in respect of their tenure and obtained a decree. In execution of this decree the entire *jama* including the 2½ bighas was sold and on the 22nd January, 1903, one Srikanta Banerjee purchased the *mokarari* tenure and became the owner thereof. The auction-purchaser then took proceedings under section 167 of the Bengal Tenancy Act to annul the incumbrance on the entire property and gave notice to the *dur-mokararidar* for that purpose. Bhushan Chandra Ghose, Jatindra Mohan Ghose and the representatives of Goberdhan Sheikh having failed to vacate possession of the 2½ bighas held by them, Srikanta Banerjee filed a suit against them praying, *inter alia*, for a declaration of title to the said portion of the lands and for *khas* possession of the same. Both the Courts below decreed the suit. The defendants Nos. 1 and 2, thereupon, appealed to the High Court, making the representatives of Goberdhan Sheikh party respondents.

Babu Bipin Behary Ghose (with him *Babu Mohini Mohan Chatterjee*), for the appellants. The interest of the appellants in the land in dispute was created by the *dur-mokararidar* and by the lapse of time they acquired a valid title to the land as against their grantor. This interest was in the nature of an

1916

BHUSHAN CHANDRA GHOSE v. SRIKANTA BANERJEE.

incumbrance, as defined by section 161 of the Bengal Tenancy Act, entitling the incumbrancer to notice in the proceedings for the purpose of annulling the incumbrance under section 167 of the Act. The appellants, thus being incumbrancers, were entitled to a separate notice in the annulment proceedings. The notice, which was served on the *dur-mokararidar*, was, therefore, insufficient so far as the appellants were concerned, and did not operate in affecting their interest in any way. *Gocool Bagdi* v. *Debendra Nath Sen* (1), followed in *Arsadulla* v. *Mansubali* (2), was referred to.

Babu Mahendra Nath Roy, (with him *Babu Kalidas Sarkar*), for the respondent Srikanta Banerjee. If the *dur-mokararidar* chose to allow a third party to take possession adversely to him of a portion of his under-tenancy, his action would not affect the right of the *mokararidars*, who could say that they were not bound to recognise the interest of the 3rd party and might proceed to eject them. An incumbrancer, for the purposes of section 167 of the Bengal Tenancy Act, was the owner of an incumbrance as defined in section 161. The defendants, who derived their title to the land in dispute by adverse title against the *dur-mokararidar*, were not the under-tenants of the *mokararidars*, nor did they become so by virtue of their adverse possession, and had no right to be treated as such. Not being under-tenants of the *mokararidars*, their interest in the land in dispute was not in the nature of an incumbrance entitling them to a separate notice in the annulment proceedings. Separate notices would be necessary only in the case of different under-tenants holding under the *mokararidar*. The notice on the *dur-mokararidar*, was, therefore, sufficient to entitle the

(1) (1911) 14 C. L. J. 136. (2) (1912) 16 C. L. J. 539.

plaintiff, who purchased the *mokarari* right, to enter into possession of the entire property including the interest of the defendants. Inasmuch as the adverse possession began during the existence of the *dur-mokarari* tenure, whatever right the defendants had acquired from the *dur-mokarariдar* would not be an under-tenancy within the meaning of section 161 as creating an incumbrance. *Womesh Chunder Goopto* v. *Raj Narain Ray* (1), *Krishna Gobind Dhur* v. *Hari Churn Dhur* (2), *Sheo Sohye Roy* v. *Luchmeshur Singh* (3), *Sharat Sundari Dabia* v. *Bhobo Pershad Khan Chowdhuri* (4), *Gunga Kumar Mitter* v. *Asutosh Gossami* (5) and *Thamman Pande* v. *The Maharaja* of *Vizianagram* (6) were relied on. *Gocool Bagdi* v. *Debendra Nath Sen* (7), referred to by the appellants, was distinguishable.

Babu Mohini Mohan Chatterjee, in reply.

SANDERSON C. J. This is an appeal from the judgment of the Subordinate Judge of Burdwan, in which he gave judgment for the plaintiff: and the defendants Nos 1 and 2, whom I may call the Ghose defendants, have appealed.

Now, it appears that in 1886, the Mukherjis who held under one Amir Ali entered into an agreement with an individual whom I shall call Pal, by which a subordinate tenure was created, and it appears that this tenure was of the character of a permanent under-tenure. It was in respect of 60 bighas, but apparently, prior to 1889 a man called Goberdhan had got into occupation of $2\frac{1}{2}$ bighas, part of the 60 bighas, and he was paying rent to the first and second defendants,

(1) (1868) 10 W. R. 15.
(2) (1882) I. L. R. 9 Calc. 367.
(3) (1884) I. L. R. 10 Calc. 577.
(4) (1886) I. L. R. 13 Calc. 101.
(5) (1896) I. L. R. 23 Calc. 863.
(6) (1907) I. L. R. 29 All. 593
(7) (1911) 14 C. L. J. 136.

1916

BHUSHAN CHANDRA GHOSE v. SRIKANTA BANERJEE.

SANDERSON C. J.

the Ghoses, and in 1889 Pal brought an action against Goberdhan and the first two defendants, the Ghoses, for the purpose of recovering possession of the 2½ bighas. He failed in that action, and from that time Goberdhan or some other occupant has been in possession of the 2½ bighas, and Goberdhan or the other occupant has been paying rent to the Ghoses down to the institution of the present suit.

Now, a suit for rent was brought by the landlord against the Mukherjis in 1902, and a decree was obtained in that suit. The plaintiff purchased the land in pursuance of that decree, and in order to obtain possession of the land free from incumbrances, he gave notice or caused notice to be given to Pal or his representatives, I am not sure whether he was still alive, for the purpose of putting an end to the incumbrance which was created under the agreement of tenancy between the Mukherjis and Pal. But the Ghoses say in this case that they too were the holders of an incumbrance within the meaning of section 167 of the Bengal Tenancy Act, and, therefore, they were entitled to notice: and, that is the question in this case, namely, whether the Ghoses were in the position of holders of such an incumbrance as entitled them to notice under section 167. I am of opinion that they were.

It appears that the tenancy was of the nature, as I have already said, of a permanent tenure which was capable of assignment either in whole or in part, and, therefore, if Pal had assigned his interest in the tenure in respect of the 2½ bighas to the Ghoses, in my judgment, the Ghoses would clearly have been in the position of incumbrancers to whom notice would have had to be given under section 167, if the plaintiff desired to get possession of the land free from incumbrances. There was no actual conveyance in this case, but it

has been held, and there is no dispute about it, that at all events ever since 1889 the Ghoses have been in possession of this 2½ bighas by means of their tenants who were in fact occupying the 2½ bighas and paying rent to the Ghoses: and, therefore, as against Pal, they have by reason of their possession as against him, obtained title, just as effective a title as if Pal had in fact conveyed his interest in the 2½ bighas to the Ghoses, and for that reason I am of opinion that the Ghoses were holders of an incumbrance and consequently it was necessary for the plaintiff, if he desired to get possession of the property free from incumbrances, to give notice not only to Pal, which in fact he did, but also to the Ghoses which in fact he did not.

The result, therefore, is that the judgment of the Subordinate Judge was wrong, because he held that it was not necessary for the plaintiff to give notice to the Ghoses, whereas, in my judgment, he was entitled to such notice.

The appeal is, therefore, allowed and the suit dismissed with costs in all the Courts.

We do not intend to decide anything by this judgment, which would prevent the plaintiff from recovering rent from the Ghoses in a proper proceeding. We do not think we can deal with that matter in this case.

MOOKERJEE J. I agree that the decree of the Subordinate Judge cannot be supported. The facts material for the determination of the question of law raised before us, lie in a narrow compass and may be briefly recited. Under one Changdar as *talukdar*, the Mukherjis hold a *mokarari* tenure. In 1886, the Mukherjis created a permanent under-tenure in favour of Pal. In 1889, the Ghoses took possession of 2½

1916

BHUSHAN CHANDRA GHOSE v. SRIKANTA BANERJEE.

MOOKERJEE J.

bighas of land included in the tenancy of Pal under the Mukherjis. This adverse possession of the Ghoses against Pal continued for the statutory period; and in 1901, by operation of section 28 of the Indian Limitation Act, the Ghoses acquired a good title to this $2\frac{1}{2}$ bighas of land as against Pal. In 1902, Changdar brought a suit for arrears of rent against the Mukherjis and obtained a decree. At the sale held in execution of that decree on the 22nd January, 1903, the plaintiff purchased the *mokarari* tenancy of the Mukherjis under Changdar. He then took proceedings under section 167 of the Bengal Tenancy Act to annul the incumbrance on the property, that is, the tenancy created in 1886 by the Mukherjis in favour of Pal. The plaintiff, it is conceded, served a notice under section 167 on Pal, and the question in controversy is, whether the notice so served affects the Ghoses.

On behalf of the plaintiff, respondent, it has been argued that he completely fulfilled the requirements of section 167 when he served notice upon Pal and that he was under no obligation to take notice of the right, if any, which by operation of law might have been acquired by the Ghoses against Pal. In support of this view, reliance has been placed on the decisions in *Womesh Chunder Goopto* v. *Raj Narain Roy* (1), *Krishna Gobind Dhur* v. *Hari Churn Dhur* (2), *Sheo Sohye Roy* v. *Luchmeshur Singh* (3), *Sharat Sundari Dabia* v. *Bhobo Pershad Khan Chowdhuri* (4), *Gunga Kumar Mitter* v. *Asutosh Gossami* (5), *Thamman Pande* v. *The Maharaja of Vizianagram* (6), which formulate the doctrine that adverse possession against a tenant is ordinarily not operative as adverse possession against the landlord during the

(1) (1868) 10 W. R. 15.
(2) (1892) I. L. R. 9 Calc. 367.
(3) (1884) I. L. R. 10 Calc. 577.
(4) (1886) I. L. R. 13 Calc. 101.
(5) (1896) I. L. R. 23 Calc. 863.
(6) (1907) I. L. R. 29 All. 593.

continuance of the lease. This proposition is obviously of no avail to the respondent. The question in controversy is, not whether the possession of the Ghoses was adverse to the Mukherjis, but whether the Ghoses have acquired by operation of law the status of incumbrancers within the meaning of section 167 of the Bengal Tenancy Act. The appellants contend that this question should be answered in the affirmative, because they are persons in whom the incumbrance, that is, the sub-tenancy created by the Mukherjis in favour of Pal in 1886, has, as to a portion thereof, become vested. In fact, after the lapse of the statutory period, the position of the Ghoses became that of grantees of $2\frac{1}{2}$ bighas from Pal. Consequently, the notice served on Pal alone is inoperative so far as the Ghoses are concerned, and has not in any way affected the interest acquired by them in the sub-tenancy.

It may be pointed out that the transfer of a share of a permanent tenure or under-tenure or of a *raiyati* holding at a fixed rate of rent, is valid under sections 11, 17 and 18 of the Bengal Tenancy Act, although, under section 88, the transferee of the share is not entitled to claim a sub-division of the tenure or holding as against the landlord. The Ghoses, here, do not claim a sub-division of the tenancy as against the plaintiff; all that they assert is that they have acquired an interest in the tenancy created by the Mukherjis in favour of Pal, that they have thus become "incumbrancers," and that they are consequently entitled to notice under section 167. This contention is clearly well founded on principle and must prevail.

Reference has been made, in the course of the argument, to the decisions in *Gocool Bagdi* v. *Debendra Nath Sen* (1) and *Arsadulla* v. *Mansubali* (2), which recognise the principle that the term "incumbrance"

(1) (1911) 14 C. L. J. 136. (2) (1912) 16 C. L. J. 539.

1916

BHUSHAN CHANDRA GHOSE v. SRIKANTA BANERJEE.

MOOKERJEE J.

used in sections 159 and 161 of the Bengal Tenancy Act includes a statutory title acquired by a trespasser by adverse possession of the land of a defaulting tenant. This doctrine has no application to the circumstances of the present case, because the Ghoses claim title and possession, not against the Mukherjis, but against Pal. The true view is that when a person has, by adverse possession against a sub-tenant, acquired a statutory title to a portion of the lands comprised in the sub-tenancy, he has an interest in the sub-tenancy, so that when on a sale of the superior tenancy for arrears of rent, the purchaser seeks to annul the sub-tenancy as an "incumbrance", such person stands in the position of an "incumbrancer" and is entitled to notice under section 167. In my opinion, this appeal must be allowed and the suit dismissed with costs in all the Courts.

O. M. *Appeal allowed.*

APPELLATE CIVIL.

Before Mookerjee and Walmsley JJ.

BROJENDRA LAL DAS

v.

DEB NARAIN TEWARI.*

1917

May 22.

Chaukidari Chakaran Lands—Included in revenue-paying estate—Resumption of, and transfer to landlord—Village Chaukidari Act (Beng. VI of 1870)—Sale of parent estate for default of payment of Government revenue—Revenue Sale Law (Act XI of 1859)—Title of purchaser.

Where chaukidari chakaran lands resumed by Government under the provisions of the Village Chaukidari Act, 1870, were transferred in 1900 to A, in consequence of whose default in paying Government revenue, the parent estate was sold in 1907 and purchased by B, and where B sued to recover possession of the same :

Held, that the purchaser at the revenue sale acquired no title to the Chaukidari Chakaran lands which were never put up to sale for realization of the arrears due from the remainder of the estate.

Ranjit Singh v. *Kali Dasi Debi* (1) followed.

Kazi Newaz Khoda v. *Ram Jadu Dey* (2), *Hareck Chand Babu* v. *Charu Chandra Sinha* (3), *Rakhal Das Mukerji* v. *Madhab Chandra Singha* (4) referred to.

Kashim Sheik v. *Prasanna Kumar Mukerjee* (5) dissented from.

SECOND APPEAL by Brojendra Lal Das and others, the defendants.

* Appeal from Appellate Decree No. 963 of 1913, against the decree of Hari Prasanna Mookerji, Subordinate Judge of Burdwan, dated Nov. 29, 1912, confirming the decree of Rash Behari Mookerjee, Munsif of Burdwan, dated Aug. 30, 1911.

(1) (1917) I. L. R. 44 Calc. 841 ; 21 C. W. N. 609.
(2) (1906) I. L. R. 34 Calc. 109 ; 11 C. W. N. 201.
(3) (1910) 13 C. L. J. 102 ; 15 C. W. N. 5.
(4) (1910) 13 C. L. J. 109.
(5) (1906) I. L. R. 33 Calc. 596; 10 C. W. N. 598.

1917

BROJENDRA LAL DAS v. DEB NARAIN TEWARI.

The facts necessary for the purposes of this report are shortly these. On the 2nd February, 1900, the lands in dispute, which were originally chaukidari chakaran lands were resumed under the Village Chaukidari Act, 1870, and transferred to the plaintiffs. The latter having defaulted to pay Government revenue, the parent estate was sold on the 27th March, 1907, and purchased by the defendants. In a suit for recovery of possession instituted on the 19th January, 1911, the plaintiffs contended that their title to the chaukidari chakaran lands was not affected by the sale of the parent estate and that they were entitled to possession. The defendant, on the other hand, pleaded that the sale under the provisions of Act XI of 1859, transferred to them, not merely the lands comprised in the parent estate but also the resumed chaukidari chakaran lands. On the 13th August, 1911, the Court of first instance decreed the suit which on appeal, the lower Appellate Court on the 29th November, 1912, confirmed.

From that decision the defendants preferred this second appeal to the High Court.

Babu Ram Chandra Mazumdar, for the appellant.

Babu Dwarkanath Chakravarty and *Babu Gopal Chandra Chakravarty*, for the respondents.

MOOKERJEE AND WALMSLEY JJ. This is an appeal by the defendants in a suit for recovery of possession of immoveable property on declaration of title. The lands in dispute were originally chaukidari chakaran lands, which were resumed under the provisions of the Village Chaukidar's Act, 1870, and were transferred to the plaintiffs on the 2nd February, 1900. Since then, the proprietors of the estate have defaulted to pay Government revenue, with the result that the parent estate was sold on the 27th March, 1907, when it was

purchased by the appellants. The plaintiffs contend that their title to the chaukidari chakaran lands was not affected by the sale of the parent estate and that they are consequently entitled to recover possession thereof. The defendants, on the other hand, maintain that the sale under the provisions of Act XI of 1859 transferred to them, not merely the lands comprised in the parent estate but also the resumed chaukidari chakaran lands. The Courts below have concurrently negatived this contention on the authority of the decision in *Kashim Sheikh* v. *Prasanna Kumar Mukerjee* (1). The correctness of that decision, however, has been called in question, and, our attention has been drawn to the cases of *Kazi Newaz Khoda* v. *Ram Jadu Dey* (2), *Hareck Chand Babu* v. *Charu Chandra Sinha* (3), and *Rakhal Das Mukerji* v. *Madhab Chandra Singha* (4). In our opinion, there is no room for controversy upon one fundamental question decided by the Judicial Committee in the case of *Ranjit Singh Bahadur* v. *Srimati Kali Dasi Debi* (5); namely, that chaukidari chakaran lands form part of the original estate, and, when they are resumed and transferred to the zemindar, the latter does not acquire thereby a new estate, as was erroneously laid down in *Kashim Sheik* v. *Prasanna Kumar Mukerjee* (1). The Village Chaukidar's Act recognises the existing title of the zemindar to the lands resumed, and the estate taken by him under the order of transfer is in confirmation and by way of continuance of his existing estate. This proposition, however, is of no real assistance to the appellants, for as purchasers, they

(1) (1906) I. L. R. 33 Calc. 596 ; 10 C. W. N. 598.
(2) (1906) I. L. R. 34 Calc. 109 ; 11 C. W. N. 201.
(3) (1910) 13 C. L J. 102 ; 15 C. W. N 5.
(4) (1910) 13 C. L. J. 109.
(5) (1917) I. L. R. 44 Calc. 841 ; 21 C. W. N. 609.

1917

BROJENDRA LAL DAS v. DEB NARAIN TEWARI.

can claim title only to what has been actually exposed for sale by the Collector. In the case before us, it is clear that the chaukidari chakaran lands have not been sold by the Collector; consequently, the appellants have acquired no title to such lands by their purchase. Indeed, the state of facts here is identical with what was foreshadowed in the case of *Kazi Newaz Khoda* v. *Ram Jadu Dey* (1). The revenue authorities have treated the parent estate as divided into two, namely, one comprising all the lands of the parent estate except the chaukidari chakaran lands and the other including the chaukidari chakaran lands; *Rakhal Das* v. *Madhab Chandra* (2). The revenue authorities have substituted two distinct estates in place of what originally constituted one integral estate. Whether this was or was not the necessary consequence of the provisions of the Village Chaukidar's Act, we need not discuss on the present occasion; we are concerned only with the legal effect of what has actually taken place. The Collector has treated the enfranchised chaukidari chakaran lands as constituting by themselves a separate estate subject to the payment of a separate assessment made under the Village Chaukidar's Act, 1870. The residue of the original estate, as created at the time of the Permanent Settlement, has been treated as a separate estate, and that alone was exposed for sale for recovery of the arrear due therefrom. The sale was not held for the recovery of the amalgamated revenue, namely, the revenue assessed at the time of the Permanent Settlement and the subsequent assessment made at the time of the resumption under the Village Chaukidar's Act, nor was the amalgamated estate brought to sale. In these circumstances, it is clearly impossible to

(1) (1906) I. L. R. 34 Calc. 109; 11 C. W. N. 201.

(2) (1910) 13 C. L. J. 109.

maintain the position that the purchaser at the revenue sale has acquired title to the chaukidari chakaran lands which were never put up to sale for realization of the arrears due from the remainder of the estate. We hold, accordingly, that the decree made by the Subordinate Judge is correct but not on the grounds set out in his judgment.

The result is that this appeal is dismissed with costs.

1917

BROJENDRA LAL DAS v. DEB NARAIN TEWARI.

L. R. *Appeal dismissed.*

APPELLATE CIVIL.

Before Mookerjee and Walmsley JJ.

JADU NATH MANNA

v.

PRANKRISHNA DAS.*

1917

May 24.

Rent—Commutation—Bengal Tenancy Act (VIII of 1885) s 40, sub-ss. (1), (2), (3), s. 109—Order for commutation of rent—Jurisdiction.

Where under s. 40 of the Bengal Tenancy Act, an application by a tenant for commutation of rent was made to a Sub-divisional Officer, who transferred the same to a Settlement Officer, who in his turn transferred it to an Assistant Settlement Officer who heard and decided the application on its merits :

Held, that it was not competent for the Sub-divisional Officer to transfer the application to the Settlement Officer.

Held, further, that it was incumbent on the Court to satisfy itself that an order made on an application under s. 40 of the Bengal Tenancy Act was made with jurisdiction, though it was not competent to examine the propriety of an order so made

* Appeal from Appellate Decree, No. 83 of 1915, against the decree of C. Bartley, District Judge of Midnapore, dated Sep. 2, 1914, confirming the decree of Netai Charan Ghose, Munsif of Tamluk, dated Aug. 6, 1913.

1917

JADU NATH MANNA v. PRAN-KRISHNA DAS.

Lalla Saligram Singh v. *Mohunt Ramgir* (1), *Kali Krishna Biswas* v. *Ram Chandra Baidya* (2) followed.

SECOND APPEAL by Jadu Nath Manna and others, the plaintiffs.

The facts shortly are these. The plaintiffs on the 18th September, 1912, instituted a suit against the defendants, purporting to recover the price of produce rent payable by the defendants for the years 1909 to 1912 at the rate of 3 *bishis* of paddy. The defendants contended that on the 7th February, 1906, their predecessor in interest, one Udai Das had applied to the Sub-divisional Officer, for commutation of rent under s. 40 of the Bengal Tenancy Act. The Sub-divisional Officer, however, transferred the application to the Settlement Officer, who was then the officer making a settlement of rents in the district, under Chapter X of the Bengal Tenancy Act. On the 14th December, 1914, the said Settlement Officer transferred the application to an Assistant Settlement Officer, who made an order for commutation of rent after hearing both parties. The defendants pleaded that the plaintiffs were not entitled to recover the price of paddy having regard to the order of commutation of rent which was to have taken effect from the year 1912. Further, that the plaintiffs could not maintain the suit without having their names registered under the provisions of the Land Registration Act.

On the 6th August, 1913, the Court of first instance partially decreed the suit, holding that the order of commutation of rent was valid and binding on the parties. On appeal, the lower Appellate Court, on the 2nd September, 1914, dismissed the appeal holding that it was not competent for the Civil Court to declare that an order under s. 40 of the Bengal Tenancy Act passed

(1) (1897) 3 C. W. N. 311.

(2) (1915) 21 C. L. J. 487; 19 C. W. N. 823.

1917

JADU NATH MANNA v. PRAN-KRISHNA DAS.

by a Revenue Court to be *ultra vires*. From this decision the plaintiffs appealed to the High Court.

Babu Dwarkanath Chackravarty, *Babu Manmatha Nath Roy* and *Babu Sarada Charan Maity*, for the appellants.

Babu Mahendra Nath Roy and *Babu Mahesh Chandra Banerjee* (for *Babu Jyotish Chandra Hazra*), for the respondents.

MOOKERJEE AND WALMSLEY JJ. This is an appeal by the plaintiffs in a suit for arrears of rent. The plaintiffs allege that the rent is payable in kind, and claim to recover the price of the produce which has not been duly delivered. The defendants contend that the rent was commuted under section 40 of the Bengal Tenancy Act by an Assistant Settlement Officer on the 12th May, 1908, and that they are consequently liable to pay cash rent at the rate then determined. Thus, the question in controversy between the parties is, whether the order under section 40 was made with jurisdiction. The Courts below have held that it was beyond the competence of the Civil Court to examine this point. In our opinion, this view cannot possibly be sustained.

The Civil Court, it is well settled, is not competent to examine the propriety of an order of commutation made with jurisdiction under section 40; in other words, the Civil Court cannot determine whether, in the circumstances of the particular case, commutation was or was not properly directed; or whether the amount assessed as cash rent is or is not adequate: *Lalla Saligram Singh* v. *Mohunt Ramgir* (1). But it is equally clear that if a question of jurisdiction arises, it is incumbent upon the Civil Court to satisfy

(1) (1897) 3 C. W. N. 311.

1917

JADU NATH MANNA v. PRAN-KRISHNA DAS.

itself that the order is made with jurisdiction; for an order made without jurisdiction is a nullity and does not affect the rights and obligations of the parties. In support of this proposition, reference may be made to the decision in *Kali Krishna Biswas* v. *Ram Chandra Baidya* (1). We must, accordingly, consider whether the order under section 40 was made with jurisdiction by the Assistant Settlement Officer.

On the 7th February, 1906, the tenant applied to the Sub-divisional Officer for commutation of his rent under section 40. The Sub-divisional Officer was undoubtedly competent to entertain the application and to decide the case on the merits. This is clear from sub-section (*2*) of section 40 as it stood at the time when the application was made. The sub-section ran in these terms: "An application" that is, application to have the rent commuted to a money rent, "may be made to the Collector or Sub-divisional Officer or to an officer making a settlement of rents under Chapter X, or to any other officer specially authorised in this behalf by the Local Government". The Sub-divisional Officer, subsequently, transferred the application to the Settlement Officer, that is, the officer making settlements of rent under Chapter X. On the 14th December 1907, the Settlement Officer, to whom the application had been transferred, proceeded to transfer it to the Assistant Settlement Officer. The Assistant Settlement Officer heard the application on the merits and made an order for commutation. The question arises, whether the Sub-divisional Officer was competent to transfer the application to the Settlement Officer. If this is answered in the negative, it becomes unnecessary to consider whether the Settlement Officer was in his turn competent to transfer the application to the Assistant Settlement Officer. Upon a plain

(1) (1915) 21 C. L. J. 487; 19 C. W. N. 823.

reading of sub-sections (*1*), (*2*) and (*3*) of section 40, there is no room for doubt that the Legislature contemplated that the application should be entertained and determined on the merits by the officer to whom it was presented by the applicant. Sub-section (*1*) contemplates an application for commutation of produce rent by either the raiyat or his landlord. Sub-section (*2*) specifies the classes of officers to whom an application of this character may be made. Sub-section (*3*) then lays down that on receipt of the application, the officer may determine the sum to be paid as money rent and may order that the raiyat shall, in lieu of paying his rent in kind, or otherwise as aforesaid, pay the sum so determined. It is clear that "the officer" mentioned in sub-section (*3*) is the officer who received the application from the applicant. It has been contended on behalf of the respondent that the power to transfer a judicial proceeding may be assumed to be inherent in the officer to whom the application has been presented, but no principle or authority has been invoked in support of this view. We hold accordingly that the Sub-divisional Officer was not competent to transfer the application to the Settlement Officer. In this view it is needless to consider whether it was competent to the Local Government to frame a rule under section 189, which authorises an officer of one of the four classes mentioned in sub-section (*2*) of section 40 to transfer the application he has received to an officer of another class specified in the section; nor is it necessary for us to determine whether this right of transfer can be claimed in succession by all officers of the classes mentioned in that sub-section. Our attention has not been drawn to any rule which authorises a Sub-divisional Officer to transfer an application received by him to a Settlement Officer. There is thus no escape from the conclusion that the order

1917

JADU NATH MANNA v. PRAN-KRISHNA DAS.

of the Assistant Settlement Officer was made without jurisdiction.

The result is that this appeal is allowed, the decree of the Court of Appeal below set aside and the case remitted to the Court of first instance for determination of the amount payable by the defendants to the plaintiffs in respect of the years in suit. Each party will pay his own costs in this Court as also in the lower Appellate Court.

L. R. *Appeal allowed.*

APPELLATE CIVIL.

Before Mookerjee and Walmsley JJ.

1917

July 5.

FANINDRA NARAIN ROY

v.

KACHEMAN BIBI.*

Consideration—Mortgage—Legal consideration—Contract Act (IX of 1872) s. 2 cl. (d).

Where A executed a mortgage in favour of X in 1884, and in consideration of X not enforcing the same and, in substitution therefor, A along with B, C, and D executed a fresh mortgage in 1893, in favour of X, and on X suing to enforce the later mortgage the Court of first instance dismissed the suit on the ground that there was no legal consideration:

Held, that the mortgage of 1893, which replaced that of 1884, was for legal consideration.

Held, further, that it was not necessary that the promisor should benefit by the consideration, it was sufficient if the promisee did some

* Appeal from Appellate Decree, No. 352 of 1912, against the decree of B. C. Mitter, District Judge of Birbhum, dated July 22, 1911, reversing the decree of Umes Chandra Sen, Subordinate Judge of Birbhum, dated Aug. 3, 1906.

act from which a third person was benefited, and which he would not have done but for the promise.

Hurkissen Dass Serowgee v. *Nibaran Chunder Banerjee* (1), *Alhusen* v. *Prest* (2), *Bailey* v. *Croft* (3), *Haig* v. *Brooks* (4) referred to.

SECOND APPEAL by Fanindra Narain Roy, the plaintiff.

The facts necessary for the purposes of this report are shortly these. In 1880, at a sale in execution of a decree against some members of a Mahomedan family, their properties were sold and passed into the hands of the plaintiff. At the request of the judgment-debtors the plaintiff re-transferred to them, for a sum of Rs. 300, the purchased property, and executed a conveyance in their favour which was never registered. On the judgment-debtor's failing to pay the consideration settled, one of the members of the said family named Sadan executed, in 1884. a mortgage in the plaintiff's favour for Rs. 300. Later, on the 11th April 1893, Sadan along with Edu, Badaruddin and Lakhu executed a mortgage bond in favour of the plaintiff in substitution of the mortgage of 1884. On the 26th February, 1906, the plaintiff instituted this suit to enforce the mortgage of 1893. The Court of first instance dismissed the suit, holding that there was no legal consideration for the mortgage, which on appeal was confirmed by the lower Appellate Court. On second appeal to the High Court, Brett and Sharfuddin JJ., on the 23rd February, 1910, allowed the appeal and remanded the case to the lower Appellate Court for the determination of other issues, one of them being whether all the defendants, that is, the representatives of Sadan, Edu, Badaruddin and Lakhu were bound by this transaction. The Court below, on the 22nd July, 1911, found that the mortgage

(1) (1901) 6 C. W. N. 27.
(2) (1851) 6 Exch. Rep.7 20
(3) (1812) 4 Taunt. 611.
(4) (1839) 10 A. & E. 309.

1917

FANINDRA NARAIN ROY v. KACHEMAN BIBI.

was, as a fact, granted by these four persons, but held that it could not be enforced against the representatives of the mortgagors other than Sadan and Edu as they were not bound by the execution sale and derived no benefit under the mortgage. From this decision the plaintiff preferred this second appeal to the High Court.

Babu Surendra Nath Ghosal, for the appellant
Babu Hemendra Nath Sen, for the respondents.

MOOKERJEE AND WALMSLEY JJ. This is an appeal by the plaintiff in a suit instituted on the 26th February, 1906, to enforce a mortgage executed in his favour on the 11th April, 1893, by four members of a Mahomedan family, by name Sadan, Edu, Badaruddin and Lakhu. The suit has now lasted for more than eleven years and has had a chequered career. It was dismissed by the Subordinate Judge on the ground that there was no legal consideration for the mortgage. That decree was confirmed by the District Judge on appeal. On second appeal to this Court, Brett and Sharfuddin JJ. held that the view which had commended itself to both the Courts below was erroneous in law. The mortgage had been executed in lieu of a prior mortgage granted by Sadan in 1884, in circumstances which may be briefly narrated. At a sale held in 1880, in execution of a decree against some members of the family, their properties were sold and passed into the hands of the mortgagee. They supplicated to him to retransfer to them for a sum of Rs. 300, the purchased property (which apparently included their homestead). He consented, and executed a conveyance which, however, was never registered. The judgment-debtors were unable to pay the decree-holder in cash the consideration settled, and the result was that Sadan executed the mortgage of 1884, for

Rs. 300. The conveyance was inoperative in law, but as the statutory period has elapsed since the date of the execution sale and, as the judgment-debtors have continued in undisturbed possession, it may be taken that the title acquired by the purchaser at the sale has become extinguished. The true position, consequently, was that a mortgage was granted to the plaintiff by Sadan in 1884 in order to induce him to forbear from the exercise of his rights as auction-purchaser. On these facts, this Court held, upon the authority of the decision in *Hurkissen Dass* v. *Nibaran Chander Banerjee* (1), that the mortgage of 1884 was granted for a lawful consideration. This necessarily justified the inference that the mortgage now in suit, which replaced the earlier mortgage, was also for a lawful consideration. This Court, thereupon, remanded the case to the District Judge for determination of the other issues in the suit. One of these issues was, whether all the defendants, that is, the representatives of Sadan, Edu, Badaruddin and Lakhu, and two other persons, were bound by this transaction. The District Judge has found, as we read his judgment, that the mortgage was, as a fact, granted by these four persons; but he has held that it cannot be enforced against the representatives of the mortgagors other than Sadan and Edu, as they were not bound by the execution sale and received no benefit under the mortgage transaction. In this view, he has decreed the suit against the representatives of Sadan and Edu and has dismissed the claim as against the others. We are of opinion that the distinction made by him between the two sets of mortgagors is not sound in principle and cannot be supported.

The mortgagors, under the bond now in suit, are all equally bound by the transaction, although two of

(1) (1901) 6 C. W. N. 27.

1917

FANINDRA NARAIN ROY v. KACHEMAN BIBI.

them might not have been directly benefited by the mortgage transaction. This is clear from the definition of the term "consideration" in section 2, clause (*d*) of the Indian Contract Act. That definition, in so far as it is applicable to the facts of this case, may be stated in the following terms: "when, at the desire of the promisor, the promisee has abstained from doing something, such abstinence is called a consideration for the promise." Here, we have, in 1884, a mortgage by Sadan in favour of the plaintiff. The plaintiff was entitled to enforce the security as against Sadan. He was asked to accept in lieu of that security a fresh bond executed in 1893 by Sadan along with three other persons, viz., Edu, Badaruddin and Lakhu. The promise by Edu, Badaruddin and Lakhu to be bound by the mortgage, plainly formed a good consideration for the abstinence of the mortgagee to sue Sadan upon the first bond. The respondents have, however, argued that a consideration is not lawful unless it benefits the promisor. There is no foundation for this contention, and were it accepted, we should have to substitute the phrase "at the desire and for the benefit of the promisor," for the phrase "at the desire of the promisor," which finds a place in clause (*d*) of section 2. We are confirmed in the view that the contention of the respondents is not well founded, from an examination of the authorities in England. Valuable consideration has been defined as some right, interest, profit or benefit, accruing to one party or some forbearance, detriment, loss or responsibility given, suffered, undertaken by the other at his request. It is not necessary that the promisor should benefit by the consideration: it is sufficient if the promisee does some act from which a third person is benefited and which he would not have done but for the promise. This view is supported by the decisions

in *Bailey* v. *Croft* (1), *Alhusen* v. *Prest* (2) and *Haig* v. *Brooks* (3). We hold, accordingly, that the reasons assigned by the District Judge in support of his conclusion that Sadan and Edu alone were responsible under the mortgage cannot be accepted. As regards defendants Nos. 3 and 10, however, the District Judge has correctly held that they were in no way bound by the transaction as they were not parties to the mortgage deed.

The result is that this appeal is allowed in part and the decree of the District Judge modified. The decree will be deemed to have been made against all the defendants other than defendants Nos. 3 and 10. The appellant is entitled to his costs of this appeal as against the defendants other than defendants 3 and 10, but he must pay the defendant No. 3, who appeared in this Court, his costs of this appeal. The costs incurred by the plaintiff appellant in all the Courts will be added to the sum due under the mortgage, and a self-contained decree will be drawn up in this Court.

L. R. *Appeal allowed in part.*

(1) (1812) 4 Taunt. 611. (2) (1851) 6 Exch. Rep. 720.
(3) (1839) 10 A. & E. 309.

APPELLATE CIVIL.

Before Richardson and Beachcroft JJ.

1918

Jan. 4

ABDUL RAHMAN

v.

AMIN SHARIF.*

Attachment before Judgment—Suit, dismissal of—Reversal on appeal—Termination of attachment—Private sale—Sale in execution of decree—Jurisdiction—Civil Procedure Code (Act V of 1908), s. 115; O. XXXVIII, rr. 9 and 11.

The Court should when dismissing a suit at the same time make the order directing the attachment before judgment to be withdrawn. But even if the order is not made, on the dismissal of the suit the attachment before judgment falls to the ground, whether an appeal is filed or not.

Sasirama Kumari v. *Meherban Khan* (1) and *Ram Chand* v. *Pitam Mal* (2) referred to.

Where the District Judge has directed property not under attachment to be sold without being first attached, the question raised is one which falls within the scope of s. 115 of the Civil Procedure Code

APPEAL by Abdul Rahman and others, the objectors.

On the 19th September, 1911, in a suit for money brought by Amin Sharif and others against Anwar Ali Miya, the plaintiffs applied and obtained an order for attachment before judgment of certain property belonging to the defendant. On the 20th November, 1911, the plaintiffs' suit was dismissed without the attachment order being withdrawn. Thereafter, the plaintiffs preferred an appeal, and on the 28th January,

* Appeal from Order, No. 337 of 1916, against the order of J. C. Twidell, District Judge of Chittagong, dated Sep. 1, 1916, reversing the order of N. N. Chatterjee, Munsif of Cox's Bazar, dated March 7, 1916.

(1) (1911) 13 C. L. J. 243. (2) (1888) I. L. R. 10 All. 506.

1918

ABDUL RAHMAN v. AMIN SHARIF.

1913, the suit was decreed by the Appellate Court with costs. In 1915 the plaintiffs in view of the fact that their order for attachment before judgment was subsisting, applied for execution of their decree by sale of the property attached. In the meantime, after the suit had been dismissed and before the Appellate Court had decreed it on appeal, the defendant sold by private sale the property in question. The purchasers at the private sale objected to the property being subsequently sold by the plaintiffs in execution of their decree without a fresh order for attachment having been made. The Court of first instance held that the previous attachment before judgment did not subsist. On appeal, this order was reversed. The objectors, thereupon, appealed to the High Court and also obtained a Rule.

Babu Chandra Sekhar Sen, for the respondent, took the preliminary objection that under s. 102 of the Civil Procedure Code no appeal lay.

Babu D. L. Kastagir, for the appellants, submitted that the attachment before judgment did not subsist. Under O. XXXVIII, r. 9, of the Code, the Court should have ordered the attachment to be withdrawn. The omission to make this order was a mistake of the Court, for which the appellants ought not to be made to suffer: see *Ram Chand* v. *Pitam Mal* (1) and *Sasirama Kumari* v. *Meherban Khan* (2). The provisions of O. XXXVIII, r. 11, of the Code, did not apply.

Babu Chandra Sekhar Sen, (*contra*). *Ram Chand* v. *Pitam Mal* (1) was distinguishable. It was under the old Code. The section of the new Code was comprehensive. The word "subsequently" in O. XXXVIII, r. 11, was not in the old Code, and meant finally. In the present case a decree was passed

(1) (1888) I. L. R. 10 All. 506. (2) (1911) 13 C. L. J. 243.

APPELLATE CIVIL.

Before Richardson and Beachcroft JJ.

1918

Jan. 4

ABDUL RAHMAN

v.

AMIN SHARIF.*

Attachment before Judgment—Suit, dismissal of—Reversal on appeal—Termination of attachment—Private sale—Sale in execution of decree—Jurisdiction—Civil Procedure Code (Act V of 1908), s. 115; O. XXXVIII, rr. 9 and 11.

The Court should when dismissing a suit at the same time make the order directing the attachment before judgment to be withdrawn. But even if the order is not made, on the dismissal of the suit the attachment before judgment falls to the ground, whether an appeal is filed or not.

Sasirama Kumari v. *Meherban Khan* (1) and *Ram Chand* v. *Pitam Mal* (2) referred to.

Where the District Judge has directed property not under attachment to be sold without being first attached, the question raised is one which falls within the scope of s. 115 of the Civil Procedure Code

APPEAL by Abdul Rahman and others, the objectors.

On the 19th September, 1911, in a suit for money brought by Amin Sharif and others against Anwar Ali Miya, the plaintiffs applied and obtained an order for attachment before judgment of certain property belonging to the defendant. On the 20th November, 1911, the plaintiffs' suit was dismissed without the attachment order being withdrawn. Thereafter, the plaintiffs preferred an appeal, and on the 28th January,

* Appeal from Order, No. 337 of 1916, against the order of J. C. Twidell, District Judge of Chittagong, dated Sep. 1, 1916, reversing the order of N. N. Chatterjee, Munsif of Cox's Bazar, dated March 7, 1916.

(1) (1911) 13 C. L. J. 243. (2) (1888) I. L. R. 10 All. 506.

1913, the suit was decreed by the Appellate Court with costs. In 1915 the plaintiffs in view of the fact that their order for attachment before judgment was subsisting, applied for execution of their decree by sale of the property attached. In the meantime, after the suit had been dismissed and before the Appellate Court had decreed it on appeal, the defendant sold by private sale the property in question. The purchasers at the private sale objected to the property being subsequently sold by the plaintiffs in execution of their decree without a fresh order for attachment having been made. The Court of first instance held that the previous attachment before judgment did not subsist. On appeal, this order was reversed. The objectors, thereupon, appealed to the High Court and also obtained a Rule.

Babu Chandra Sekhar Sen, for the respondent, took the preliminary objection that under s. 102 of the Civil Procedure Code no appeal lay.

Babu D. L. Kastagir, for the appellants, submitted that the attachment before judgment did not subsist. Under O. XXXVIII, r. 9, of the Code, the Court should have ordered the attachment to be withdrawn. The omission to make this order was a mistake of the Court, for which the appellants ought not to be made to suffer: see *Ram Chand* v. *Pitam Mal* (1) and *Sasirama Kumari* v. *Meherban Khan* (2). The provisions of O. XXXVIII, r. 11, of the Code, did not apply.

Babu Chandra Sekhar Sen, (*contra*). *Ram Chand* v. *Pitam Mal* (1) was distinguishable. It was under the old Code. The section of the new Code was comprehensive. The word "subsequently" in O. XXXVIII, r. 11, was not in the old Code, and meant finally. In the present case a decree was passed

(1) (1888) I. L. R. 10 All. 506. (2) (1911) 13 C. L. J. 243.

1918

ABDUL RAHMAN v. AMIN SHARIF.

finally; the attachment, therefore, subsisted. If the Court of first instance had withdrawn the attachment order the respondents could have applied for fresh attachment before the Appellate Court. Furthermore, this was not a case in which the High Court should interfere under s. 115 of the new Code.

Appellants were not called upon.

RICHARDSON J. A preliminary point is taken in this appeal that no appeal lies under section 102 of the Civil Procedure Code. We are of opinion that this objection is good and that the appeal must be dismissed.

The appellants, however, succeeded in obtaining a Rule from this Court which raises the same question as is raised in the appeal. The question turns on the provision contained in rule 9 of Order XXXVIII of the Civil Procedure Code. The rule runs as follows:— "Where an order is made for attachment before judgment, the Court shall order the attachment to be withdrawn when the defendant furnishes the security required, together with security for the costs of the attachment, or when the suit is dismissed." It appears that on the 19th September, 1911, certain property belonging to the defendant in the suit out of which these proceedings arise was attached before judgment. The suit was dismissed by the trial Court on the 20th November, 1911. On appeal the suit was decreed on the 28th January, 1913. In the interval the property attached before judgment, had been purchased at a private sale by the appellants or rather the petitioners. In 1915, the decree-holders applied for execution of their decree by the sale of the property on the footing that the attachment before judgment subsisted and that it was unnecessary for them to apply for re-attachment of the property. It is obvious that they were bound to frame their application for execution in that way

1918

ABDUL RAHMAN v. AMIN SHARIF.

RICHARDSON J.

because, if the attachment before judgment did not subsist, the property having been purchased by the petitioners could not be attached or sold in execution. The point made on behalf of the decree-holders is that when the first Court dismissed the suit it omitted to carry out the direction in rule 9 of Order XXXVIII of the Code that the Court should at the same time order the attachment to be withdrawn. If that order had been made, there can be no doubt that the attachment would not have subsisted and would not have been revived by the fact that on appeal the decree of dismissal was set aside and the suit was decided in the plaintiffs' favour. As authority for that, if authority is needed, we may refer to the case of *Sasirama Kumari* v. *Meherban Khan* (1) decided by Mookerjee and Coxe JJ. The argument is that the Court having omitted to make an order withdrawing the attachment, the attachment continued. This point was decided by the learned Munsif against the decree-holders and by the learned District Judge in their favour. With great respect to the latter I agree with the Munsif. The observations made by Mr. Justice Mahmood in the case of *Ram Chand* v. *Pitam Mal* (2), are as applicable to the present Code as to the previous Code and in my opinion they correctly state the law. In principle as pointed out by Mr. Justice Mookerjee in the first case cited, the attachment before judgment should come to an end when the suit is dismissed. And I agree with Mr. Justice Mahmood when he says, speaking of the Code of 1882, that the part of the rule requiring the Court to remove the attachment was never intended to be more than directory. There is no doubt that in order to avoid all possible doubt and difficulty the Court should, when dismissing a suit, at the same time make the order directing the attachment to be withdrawn.

(1) (1911) 13 C. L. J. 243. (2) (1888) I. L. R. 10 All. 506.

1918

ABDUL RAHMAN v. AMIN SHARIF.

RICHARDSON J.

But even if the order is not made, in my opinion, on the dismissal of the suit the attachment before judgment falls to the ground.

Some attempt was made to argue that rule 11 of Order XXXVIII has made some change in the law by reason of the word "subsequently" which appears in that rule. The rule is as follows: "Where property is under attachment by virtue of the provisions of this Order and a decree is subsequently passed in favour of the plaintiff, it shall not be necessary upon an application for execution of such decree to apply for a re-attachment of the property." But that rule cannot be read in the way in which the learned pleader for the respondent seeks to read it. It applies only where the property is under attachment and a decree is passed subsequently. It is begging the question to say that the property remains under attachment after the suit has been dismissed or that the attachment revives when an appeal is lodged. If the property is not under attachment at the date of the appeal, this rule can have no application, even though a decree be subsequently made in favour of the plaintiff. It is obvious that if the suit is dismissed and no appeal is preferred the attachment, whether an order withdrawing it is made or not, must cease and I cannot see that the filing of an appeal makes any difference.

For the reasons indicated, the judgment of the District Judge is, in my opinion, erroneous and must be set aside. The Rule is accordingly made absolute.

It has been suggested that no question of jurisdiction arises which justifies us in interfering with the District Judge's order under section 115 of the Civil Procedure Code. But clearly, if the property is not under attachment, the District Judge had no jurisdiction to direct it to be sold without being first attached.

1918

ABDUL RAHMAN v. AMIN SHARIF.

The question raised is, therefore, one which falls within the scope of section 115.

The result is that the Rule must be made absolute and the order of the Court below set aside. The petitioners are entitled to their costs.

BEACHCROFT J. I agree.

O. M. *Appeal dismissed.*
Rule absolute.

APPELLATE CIVIL.

Before Richardson and Beachcroft JJ.

1918

Jan. 15.

NAGENDRA LAL CHOWDHURY

v.

FANI BHUSAN DAS.*

Limitation—Attachment in execution—Claim proceeding—Claim rejected for default and without investigation—Subsequent title suit—Limitation Act (IX of 1908), Sch. I, Art. 11—Civil Procedure Code (Act V of 1908) O.XXI, rr. 58 and 63.

Where a claim is preferred under O.XXI, r. 58 of the Civil Procedure Code and an order is passed either allowing or rejecting, the party against whom the order is made, may, irrespective of whether any investigation took place or not, bring a suit in the language of O.XXI, r. 63 "to establish the right which he claims to the property in dispute," or in the language of Art. 11 of Sch. I of the Limitation Act, 1908, "to establish the right which he claims to the property comprised in the order," and the suit must be brought within the year allowed by Art. 11.

* Appeal from Appellate Decree, No. 2988 of 1914, against the decree of Ramesh Chandra Bose, officiating Subordinate Judge of Chittagong, dated May 28, 1914, affirming the decree of Kumud Kanta Sen, Munsif of South Raozan, dated June, 30, 1913.

1918

NAGENDRA LAL CHOWDHURY v. FANI BHUSAN DAS

Sardhari Lal v. *Ambika Pershad* (1), *Jugal Kishore Marwari* v. *Ambika Debi* (2) and *Umacharan Chatterjee* v. *Heron Moyee Debi* (3) referred to.

Narasimha Chetti v. *Vijiapala Nainar* (4) and *Ponnusami Pillai* v. *Samu Ammal* (5) approved.

SECOND APPEAL by Nagendra Lal Chowdhury, the defendant No. 1.

One Fani Bhusan Das and his brother Manindra Nath Das were joint owners of certain property, which they had inherited from their deceased father. Manindra, subsequently, sold his share in the ancestral property, which included a *pucca* house, to his brother in order to avoid the said share falling into the hands of his creditors. It was agreed between the brothers that Manindra should remain in occupation of the *pucca* house above-mentioned, for a period of two years, within which Manindra would arrange for a separate house for himself and then give over vacant possession of the said *pucca* house to Fani Bhusan. On the expiration of the period of the two years stipulated above, Manindra refused to vacate the premises in question and Fani Bhusan in consequence served him with notice to quit. Thereupon, one Nagendra Lal Chowdhury, in execution of a decree attached Manindra's share in the ancestral property and put the same up for sale. Fani Bhusan thereafter preferred a claim under O. XXI, r. 58 of the Civil Procedure Code to the property ordered to be sold. The claim was, subsequently, dismissed for default on the ground of delay. After the lapse of a period of more than a year from the date of dismissal of the claim proceeding, Fani Bhusan instituted a suit under O. XXI, r. 63 of the Code praying, *inter alia*, for declaration of his title to the property in question,

(1) (1888) I. L. R. 15 Calc. 521; L. R. 15 I. A. 123.
(2) (1912) 16 C. W. N. 882.
(3) (1913) 18 C. W. N. 770.
(4) (1914) 27 Ind. Cas. 944.
(5) (1916) 31 Mad. L. J. 247.

for ejectment of Manindra from the premises in occupation and for withdrawal of the attachment made by Nagendra. Both the lower Courts decreed the suit. Nagendra, thereupon, appealed to the High Court.

Dr. Sarat Chandra Basak (with him *Babu Chandra Sekhar Sen*), for the appellant. The *first* question was whether this was a suit within Art. 11 of Sched. I of the Limitation Act, 1908. There was a divergence of judicial opinion under the Limitation Act of 1877: see *Jugal Kishore Marwari* v. *Ambika Debi* (1). Whatever might have been the law under Art. 11 of the old Limitation Act, there was no question that the Legislature had materially altered the wording of the Article in the new Act, and now a suit must be instituted within one year from the date of the decision in the claim proceeding to prevent the suit being barred by Art. 11 of Sched. I of the Limitation Act, 1908. This Article applied equally to cases in which there had been investigation and to cases where there had been no investigation in the claim proceeding. In support of this contention *Ponnusami Pillai* v. *Samu Ammal* (2), *Narasimha Chetti* v. *Vijiapala Nainar* (3) and *Sardhari Lal* v. *Ambika Pershad* (4) were referred to.

The *second* question in this appeal was whether this suit was barred by s. 53 of the Transfer of Property Act.

[The Court stopped Dr. Basak and called on the respondents, holding that if it decided the appeal in the appellant's favour on the question of limitation under Art. 11 of the Limitation Act, there would be no need to go into the question of bar to the suit under s. 53 of the Transfer of Property Act.]

(1) (1912) 16 C. W. N. 882.
(2) (1916) 31 Mad. L J. 247.
(3) (1914) 27 Ind. Cas. 449.
(4) (1888) I. L. R. 15 Calc. 521; L. R. 15 I. A. 123.

1918

NAGENDRA LAL CHOWDHURY v. FANI BHUSAN DAS.

Babu Jogesh Chandra Roy (with him *Babu Probodh Kumar Das*), for the respondent, submitted that the Legislature never intended to overrule the old cases. It merely contemplated bringing all the cases under one article of the Limitation Act. In the present case the claim proceeding was rejected for delay and no investigation had taken place in that proceeding. That order of rejection did not fall under Art. 11 of the Limitation Act, 1908. The word "order" in that Article meant an order made either after investigation or in default. Where a claim was not entertained at all, there could not be any order in such a proceeding. It was only in the case of a claim being entertained and an order made after investigation or in default that Art. 11 would apply: see *Venkapa* v. *Chenbasapa* (1), *Krishnaji Vithal* v. *Bhashkar Rangnath* (2), *Kallar Singh* v. *Toril Mahton* (3), *Karsan* v. *Ganpatram* (4) *Sarat Chandra Bisu* v. *Tarini Prasad Pal Chowdhry* (5), *Sarala Subba Rau* v. *Kamsala Timmayya* (6), *Umacharan Chatterjee* v. *Heron Mojee Debi* (7) and *Ganesh Krishna Kulkarni* v. *Damoo Nathu Shimpi* (8).

The appellant was not called on to reply.

RICHARDSON J. The only question to which we need address ourselves in this appeal is the question of limitation, In the course of certain execution proceedings, the property now in dispute was attached The present plaintiff preferred a claim to the property under Order XXI, rule 58 of the Code of Civil Procedure. The claim was rejected and he brought this suit to establish his title to the property and

(1) (1879) I. L. R. 4 Bom. 21.
(2) (1880) I. L. R. 4 Bom. 611.
(3) (1895) 1 C. W. N. 24.
(4) (1897) I. L. R. 22 Bom. 875.
(5) (1907) I. L. R. 34 Calc. 491.
(6) (1907) I. L. R. 31 Mad. 5.
(7) (1913) 18 C. W. N. 770.
(8) (1916) 18 Bom. L. R. 782.

for consequential reliefs. It is not disputed that if the order made in the execution proceedings rejecting the claim was an order within the scope of Order XXI, rule 63, the present suit is a suit of the nature contemplated by that rule and is governed as to limitation by Article 11 of the Limitation Act of 1908. The period of limitation prescribed for such a suit is one year from the date of the adverse order in the claim case. Here the suit was instituted more than a year after the claim was rejected. The defendant No. 1 pleaded therefore that the suit was out of time. The contention put forward on the plaintiff's behalf is that the claim having been rejected for default and without investigation, the order of rejection was not an order within Order XXI, rule 63 and Article 11 had no application. The contention proved successful in the Courts below and the appeal before us has been preferred by the defendant No. 1.

Now, it may be useful to cite in this connection the language used by Lord Hobhouse in delivering the judgment of the Privy Council in the case of *Sardhari Lal* v. *Ambika Pershad* (1). Lord Hobhouse said: "The order," that is, the order in the claim case to which he was referring "was made; and it was an order within the jurisdiction of the Court that made it. It is not conclusive; a suit may be brought to claim the property, notwithstanding the order; but then the law of limitation says that the plaintiff must be prompt in bringing his suit. The policy of the Act evidently is to secure the speedy settlement of questions of title raised at execution sales and for that reason a year is fixed as the time within which the suit must be brought."

If that was the policy of the law under the Civil Procedure Code of 1877 and the Limitation Act of the

(1) (1888) I. L. R. 15 Calc. 521 ; L. R. 15 I. A. 123.

1918

NAGENDRA LAL CHOWDHURY v. FANI BHUSAN DAS.

RICHARDSON J.

same year, it is still more emphatically the policy of the law under the present Civil Procedure Code and the present Limitation Act.

On the plaintiff's behalf reliance has been placed on decisions of this Court under Article 11 of the Limitation Act of 1877, but those decisions are no longer of authority because the language of Article 11 has been altered in the Act of 1908. The change made follows the change made in section 283 of the Code of 1882 now represented by rule 63 of Order XXI. Section 283 ran as follows: "The party against whom an order under sections 280, 281, or 282 is passed may institute a suit to establish the right which he claims to the property in dispute." Rule 63 on the other hand says that "where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute." The specific reference to the previous sections or rules has been omitted. A corresponding change has been made in Article 11. The ground therefore on which the cases under the previous Limitation Act and the previous Code were decided, that the sections specifically referred to in Article 11 and in section 283 of the Code required some investigation to be made, is gone. Rule 63 of the present Civil Procedure Code and Article 11 of the present Limitation Act are quite general in their terms. All that is now necessary is that a claim should be preferred under rule 58 and that there should be an order either allowing or rejecting it. The party against whom the order is made may then bring a suit in the language of rule 63 "to establish the right which he claims to the property in dispute" or in the language of Article 11 "to establish the right which he claims to the property comprised in the order" and the suit must be brought within the year allowed by Article 11.

The Courts below have plainly erred in applying the old cases to the present law. Even under the Limitation Act of 1877 there was some difference of opinion on the question whether an order rejecting a claim made without investigation came within Article 11 or not In the case of *Jugal Kishore Marwari* v. *Ambika Debi* (1), Mookerjee and Beachcroft JJ. observed in their judgment that though there might be some divergence of judicial opinion there was weighty authority in support of the view that where an application had been dismissed with or without investigation a regular suit, if instituted, must be commenced within one year from the date of such order; and the learned Judges cited reported cases in support of that observation.

The case of *Umacharan Chatterjee* v. *Heron Moyee Debi* (2) was decided in 1913 but the Article applied was Article 11 of the Limitation Act of 1877 and the case is of no assistance to the plaintiff. No doubt the learned Judges there held that Article 11 of the Act of 1877 was not applicable where there had been no investigation of the claim. But at the same time they referred to the change which had been made in the language of Article 11 by the Act of 1908 and remarked that the change might have altered the law.

The view we take is supported by two decisions of the Madras High Court, *Narasimha Chetti* v. *Vijiapala Nainar* (3) and *Ponnusami Pillai* v. *Samu Ammal* (4), in which the learned Judges pointed out that the language of Article 11 of the Act of 1908 was more comprehensive than the language of the preceding Act and refused to restrict the Article to those cases in which an investigation had taken place.

(1) (1912) 16 C. W. N. 882.
(2) (1913) 18 C. W. N. 770.
(3) (1914) 27 Ind. Cas. 944.
(4) (1916) 31 Mad. L. J. 247.

1918

NAGENDRA LAL CHOWDHURY v. FANI BHUSAN DAS.

The result is that this appeal must be allowed and the whole suit dismissed with costs, both here and in the Courts below. But the dismissal of the suit will be without prejudice to any right which the plaintiff may have as against the defendant No. 2.

BEACHCROFT J. I agree.

O.M.

Appeal allowed.

PRIVY COUNCIL.

DAKAS KHAN

v.

GHULAM KASIM KHAN.

*P.C.**
1918

Feb. 7.

[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER, NORTH-WEST FRONTIER PROVINCE, AT PESHAWAR.]

Wajib-ul-arz—Authority of, as evidence—Its importance in settlement proceedings—Presumption as to its correctness until successfully impugned though not a document creating a title—Dispute between proprietors of two adjacent villages as to the ownership of village common lands—Limitation.

The authority of a wajib-ul-arz or record-of-rights which is described by Sir Henry Maine in his "Village Communities" page 72, as a detailed statement of all rights in land drawn up periodically by the functionaries employed in settling the claims of the Government to their shares of the rental, and as the most important object of the Settlement Operations, not second even to the adjustment of Government revenue, is universally recognised.

Lali v. *Murlidhar* (1) referred to.

Though a wajib-ul-arz does not create a title, it gives rise to a presumption in its support which prevails until its correctness is successfully impugned.

In a dispute between the proprietors of two villages, Mauzah Darakki and Mauzah Sher Ali, of which the former belonged to the plaintiffs, and the latter to the defendants, as to the ownership of village common lands measuring upwards of 7,989 acres, the plaintiffs contended that these lands belonged to them jointly with the defendants in proprietary right by virtue of the ownership of the two villages, and the defendants maintained that they were the exclusive proprietors, their Lordships *held* that the final determination of the case depended on the interpretation to be placed on the wajib-ul-arz in which the final result of the settlement proceedings

* *Present*: LORD BUCKMASTER, SIR WALTER PHILLIMORE, BART., AND SIR LAWRENCE JENKINS.

(1) (1906) I. L. R. 28 All. 488, 492 : L. R. 33 I. A. 97, 101.

1918

DAKAS KHAN v. GHULAM KASIM KHAN.

was recorded ; and on that document together with the facts of the case, the plaintiffs' claim to joint ownership failed. The statements in the other documentary evidence adduced were ambiguous and not immutable

The laches of the plaintiffs in failing to assert their claim after it had been repeatedly and consistently challenged as long ago as 1883 was a circumstance, among others, very unfavourable for its success apart from the bar of limitation.

APPEAL 49 of 1916 from a decree (13th January 1913) of the Court of the Judicial Commissioner, North West Frontier Province, at Peshawar, which varied a decree (10th May 1912) of the District Judge of Dera Ismail Khan.

The plaintiffs were the appellants to His Majesty in Council.

The suit in which the above decrees were passed was instituted, on 23rd March 1909 by the appellants (the proprietors of the village of Darakki) against the respondents (the proprietors of the village of Sher Ali) to establish their right as joint owners with them of certain *shamilat*, or village common, lands of 7,989 acres. The main questions for determination in this appeal, were whether such a right existed, and if so, whether it is barred by limitation.

The facts are, for the purpose of this report, sufficiently stated in the judgment of the Judicial Committee.

The relief claimed was (*a*) that the plaintiffs be declared to be joint owners with the defendants, (*b*) that the conditions laid down in section 14 of the wajib-ul-arz, or record of rights, of the former settlement be restored, (*c*) or any other suitable relief be granted.

The defendants denied the plaintiffs' claim and alleged that in any case it was barred by lapse of time.

The District Judge found that the plaintiffs had on the evidence established joint ownership of the lands

in suit, with the defendants, and that though one cause of action had accrued to the plaintiffs in 1895, and had become barred, another cause of action had accrued when the defendants began to interfere with the plaintiffs' rights on the basis of the entry in the revised settlement. This settlement he found to have been completed only after 6th August 1904, and he accordingly held that the suit was not barred by limitation. He also held that clause 14 of the wajib-ul-arz was still in force.

On appeal by the defendants, the Judicial Commissioner (Mr. W. P. BARTON) held that the claim to a declaration of joint ownership was barred, reversing on that point the decree of the District Court. The alternative claim to rights under clauses 14 and 17 of the wajib-ul-arz was not barred, and the decree of the first Court declaring that clause 14 was still operative was upheld. The Judicial Commissioner concluded his judgment thus:—

"The view I take of the position is this. Plaintiffs' rights were definitely traversed by defendants in 1883; and they should have met the menace by a suit within 6 years from the date. If, however, they can show that they continued to be joint owners throughout they are not precluded from treating the fresh invasion of their rights in 1904 as a new cause of action and the present suit would in that case lie. Have plaintiffs proved this point? There is no doubt that they have continued to enjoy the profits of the waste and they have also brought 4000 Kanals or so of the land under cultivation, in much of which they have acquired occupancy rights. They have not, however, gone beyond this, and such incidents by themselves do not constitute acts of ownership in the waste. Plaintiffs have in fact been confined to the exercise of the rights recited in the administration paper, clauses 14 and 17. The exercise of the right to take rent or contributions towards the land revenue from the tenants, which marks the true proprietorship of the waste, has vested in the Sher Ali proprietary body. In these circumstances it cannot be held that plaintiffs' possession and enjoyment of the waste has been that of co-sharers. They have exercised strictly limited rights which, by the peculiar system of the land tenure in vogue in the

1918

DAKAS KHAN v. GHULAM KASIM KHAN.

greater part of the Dera Ismail Khan district, are separable from full ownership. Defendants have set up an adverse title to plaintiffs during the past thirty years, and even if that title had not the sanction of the Revenue Records, it has long since ripened by prescription. On these grounds I find that the plaintiffs' claim to a declaration of joint ownership is barred by limitation under section 120, Schedule II, Limitation Act.

"The alternative claim to rights under sections 14 and 17 of the old administration paper stands on a different footing.

"The omissions of clauses 14 and 17 in 1904 constitute a new cause of action and the suit instituted in 1909 is within time. It is in fact admitted by counsel for defendants that the rights conferred on plaintiffs by those clauses are still exercisable. The actual meaning of these clauses need not be discussed. That will be a question chiefly for the Revenue authorities in connection with the acquisition of occupancy rights by cultivators and the setting apart of land for cultivation, should disputes arise. The appeal is accordingly accepted to this extent that the claim relating to joint ownership is dismissed. The rest of the decree of the lower Court declaring that clause 14 is still operative will stand. Defendants will get their costs in this appeal as they have succeeded on the principal issue, and have admitted plaintiffs' rights as regards the alternative prayer."

On this appeal, which was heard *ex parte*,

De Gruyther, K. C., and *E. B. Raikes*, for the appellants.

[The nature and scope of the arguments appear from the judgment.]

Feb. 7. The judgment of their Lordships was delivered by

SIR LAWRENCE JENKINS. In the district of Dera Ismail Khan there are two villages, Mauzah Darakki and Mauzah Sher Ali. Of the first the plaintiffs are the proprietors, of the second the defendants.

The dispute is between the proprietors of these two villages as to the ownership of village common lands measuring upwards of 7,989 acres. The plaintiffs contend that these lands belong to them jointly with the defendants in proprietary right by virtue of ownership of the two villages; the defendants maintain that they are the exclusive proprietors. There was

a subsidiary question as to the omission of certain provisions from the wajib-ul-arz relating to these common lands, but on this there is no longer any contest.

On the 10th May 1912, the District Judge of Dera Ismail Khan decided on both points in the plaintiffs' favour. On the 13th January 1913, this decree was varied by the Judicial Commissioner, North-West Frontier Province, who dismissed the plaintiffs' claim of joint ownership. In other respects the decree was confirmed. It is from this variation in the appellate decree that the present appeal has been preferred by the plaintiffs.

The history of the land in suit is summed up in the following passage taken from the judgment of the Judicial Commissioner :—

"This land originally formed part of the hinterland of the Kundi village of Darakki. During the period that Nawab Sarwar Khan of Dera, held a vague authority in the district under the Sikhs, one Mian Khan, a Kundi, obtained a Sanad authorising him to found a new village on the Darakki waste. He collected a group of colonists, consisting chiefly of Murats, and the village of Sher Ali was established. At the regular settlement (1874-78) the separate entity of Sher Ali was recognised by the authorities, and the persons actually holding land in the village were shown as owners in the Records of Rights."

Mian Khan was not an unwarranted intruder, entering on his new possession with a strong hand and with no sanction. He acted under the authority of the Nawab. And in this connection it is interesting and relevant to observe what Sir Henry Maine has to say of such matters :—

"The Native Indian Government," he writes, "sometimes claimed (though in a vague and occasional way) some exceptional authority over the waste; and acting on this precedent the British Government at the various settlements of land revenue has not seldom interfered to reduce excessive waste, and to re-apportion uncultivated lands among the various communities of a district." ("Village Communities," p. 122.)

1918

DAKAS KHAN v. GHULAM KASIM KHAN.

This is aptly illustrated at p. 38 of Vol. II of "Tupper's Punjab Customary Law," where it is said :—

"Nawab Muhammad Khan, Sddaozai, Governor of the province of Dera, gave a great impulse to Beloch immigration. Without much regard to the claims of the old *had* proprietors, he allotted waste lands to anyone who would found a village."

It is principally by reference to the settlement of 1874-78 that the dispute between the litigants has to be determined.

There are certain matters that are beyond controversy. Thus it is clear (*a*) that though what is now Mauzah Sher Ali was at one time a part of Mauzah Darakki, it was at the date of the settlement, and still is, a separate and distinct village, and (*b*) that the lands in suit are within the boundaries of Mauzah Sher Ali.

At the same time it is apparent from the Revenue proceedings which led up to the wajib-ul-arz of 1878 that in adjusting the rights in these lands regard was had to the origin and history of Mauzah Sher Ali, and it was a part of the scheme of adjustment that the claims of the parent Mauzah should be recognised. The settlement officer responsible for the Robkar of the 5th February 1876, recorded the opinion that it was fair and proper that the waste land should be entered as the joint property of the village Sher Ali and Mauzah Darakki. But from the earlier part of this document, it would seem that what was in the settlement officer's contemplation was that the zamindars of Darakki should have equal rights with the cultivators of the Murat tribe to break up the waste lands of Mauzah Sher Ali.

The next document that calls for notice is the Shajra Nasb, or genealogical tree. The whole of it is not on the record but only section 1, which is, in effect, a narrative of the origin and development of

Mauzah Sher Ali. It is there stated that: The proprietors of sher Ali and Darakki villages were held as *malikan gabiz* (proprietors in possession) of 7,989 ghumaoan, 6 kanals, 14 marlas of shamilat land." It has been urged that this supports the appellants' case, and much has been made of the expression *malikan gabiz*. But here their Lordships are confronted by an initial difficulty. In the official translation of this document, Exhibit No. 25, there is no sort of indication that this statement as to proprietorship was derived from or based on the terms of the wajib-ul-arz; but in his judgment the District Judge renders this part of the document in these words :—

"According to paragraph 14 of the wajib-ul-arz 7,789 ghomaos, 6 kanals, 14 marlas of land was held to be the Shamilat property of the proprietors of Mauzahs Darakki and Sher Ali."

Which of these renderings is the more correct their Lordships have no means of judging, and their difficulties in this respect are enhanced as the appeal has been heard *ex parte*. Yet there is a vital and obvious difference between their effect for the purpose in hand. In the one there is what purports to be an independent statement of the rival rights; in the other there is a statement which is merely the interpretation placed on paragraph 14 of the wajib-ul-arz. Nor do the difficulties end there. The expression *malikan gabiz* is a term of art used for the purpose of settlement proceedings, and before its value as an indication of any group of rights or their quality can be justly appreciated its precise signification in this context should be known. And here again their Lordships have been left without such assistance as would justify a decisive pronouncement on the point. That the expression may bear a meaning that would not advance the plaintiffs' case may be reasonably inferred as a possibility from a passage to be found at p. 150 of

1918

DAKAS KHAN v. GHULAM KASIM KHAN.

Boulnois and Rattigan's "Customary Law." But, when all is said and done, the statements of these documents were not immutable, and the determination of this case must depend on the interpretation to be placed on the wajib-ul-arz or record of rights in which the final result of the settlement proceedings was recorded.

A record of rights has been described by Sir Henry Maine as a detailed statement of all rights in land drawn up periodically by the functionaries employed in settling the claims of the Government to its shares of the rental ("Village Communities," p. 72). He adds that—

"The most important object of the settlement operations—not second even to the adjustment of Government revenue—is to construct a record of rights, which is a detailed register of all rights over the soil in the form in which they are believed to have existed on the eve of the conquest or annexation."

The authority of such a document is universally recognised, and in *Lali* v. *Murlidhar* (1) it was said :—

"The term wajib-ul-arz in the North-Western Provinces is applied to what is considered to be the most important document contained in the official records relating to the village administration."

Though it does not create a title, it gives rise to a presumption in its support, which prevails until its correctness is successfully impugned.

Had the opinion expressed in the Robkar been reproduced in the wajib-ul-arz, and had the villagers of Daraki been entered there as owners jointly with the "proprietors of Murat tribe," it might well have been contended that the plaintiffs' title was impregnable. But this was not done, and an examination of the wajib-ul-arz shows that it was a far more complete and exhaustive adjustment of rights than the outline sketched in the proposals of the Robkar.

(1) (1906) I. L. R. 28 All. 488, 492 ; L. R. 33 I. A. 97, 101.

It will be found that the proposed rights of cultivation and grazing are carefully safeguarded. And though the method employed may not have followed literally that contemplated by the author of the Robkar, it calls for no great ingenuity to guess how, on balancing expediencies and reckoning up the advantages, it may have been felt, when the final word came to be said, that the conflict of claims could be best reconciled and most conveniently arranged by bestowing the inferior rights of enjoyment on both villages alike, but securing the superior right of proprietorship, with its obligations to the Government, exclusively to the village in which the lands were situated and of which they formed a part for the purposes of revenue administration.

The only sections of the wajib-ul-arz disclosed in the record are the 14th and the 17th, and on their true construction they do not (in their Lordships' opinion) support the contention that their legal effect was that for which the appellants contend. Section 14 draws a sharp distinction between the superior right of proprietorship of the village common lands and the inferior right of bringing them under cultivation and of grazing cattle. The superior right is recorded as belonging to the proprietors of the Murat tribe, or in other words, the proprietary body of Mauzah Sher Ali, and the inferior right as vested in the Khewatdars of both mauzahs. Section 17, after dealing with the cultivation of the village common land and the revenue to be paid, provides that the income is to go to the revenue of Mauzah Sher Ali, and not to Darakki. The learned Judicial Commissioner, in holding that the defendants' title had the sanction of the Revenue Records attributed great importance to this provision as to the revenue, and their Lordships do not think he exaggerated its significance when he described it as

1918

DAKAS KHAN v. GHULAM KASIM KHAN.

marking the true proprietorship of the waste lands. Indeed, counsel was unable to point to any other circumstance in the case as a mark of proprietorship which was not equally, and even preferably, referable to the inferior right of cultivation and grazing bestowed on the villagers of the two mauzahs.

This view as to the meaning and effect of the wajib-ul-arz has not been held by the Judicial Commissioner alone. In the report of Mr. S. Mulaim Din, Tahsildar Tank, dated the 3rd July 1894, it is said that the names of the Darakki people are not shown in the column of proprietorship in the settlement and the Jamabandi files, but it is shown as village shamilat of the proprietors of Sher Ali. And this opinion is repeated in the Commissioner's order of the 20th May 1895. These views are of value, as Revenue officers would be intimately conversant with topics of this kind.

Nor do the difficulties in the appellants' way rest there, for the subsequent treatment of the lands lends no small support to the view expressed as to the legal effect of the wajib-ul-arz.

To begin with, the revenue of the lands has actually been received and dealt with according to the provisions of section 17. Then, again, from 1878 onwards the lands have been consistently shown in the official records as the Shamilat Deh of Mauzah Sher Ali. The appellants seek to escape from the obvious inference this invites by the suggestion that this entry merely indicated the situation of the land within the bounds of Mauzah Sher Ali, and was in no sense a token that the proprietorship belonged to that village. This attempted explanation leaves their Lordships unconvinced.

And it is not as though there was this entry in the records and nothing more. The Darakki claim to

proprietorship has been repeatedly and consistently challenged. As far back as 1883, the learned Judicial Commissioner declares, the plaintiffs' rights were definitely traversed. Then, from Mr. Bruce's order of the 20th May 1895, it is apparent that the villagers of Sher Ali at that time asserted that the Darakki village had no proprietary rights in the land and denied the Darakki title. Again in 1900 this denial was repeated. And yet it was not until the institution of this suit on the 23rd of March 1909, that the plaintiffs attempted to vindicate their claim in a Court of law, though long before this the urgent necessity of such action had been pressed on them. It would be wrong to treat all this as of no moment. Apart from any bar of limitation which this delay may entail, the reluctance, or, at any rate, prolonged failure, of the Darakki villagers to assert their claim in the Civil Courts, whether due to a lack of confidence in its merits or not, imposes on their Lordships the clear and imperative duty of cautious reserve before accepting the appellants' contention that the decree adverse to their claim should be reversed. And the need for this reserve is the greater as this case with its difficulties and peculiarities has come before this Board in the absence of anyone to present the defendants' case.

But, in truth, so far from being convinced that the decree under appeal is erroneous, their Lordships consider it to be amply supported by a judgment which is well reasoned and well founded; and they certainly are not prepared to dissent from the Appellate Court's conclusion that the plaintiffs' claim to joint ownership has failed.

Nor do their Lordships differ from that Court's decision that the plaintiffs' claim to a declaration of joint ownership is barred by limitation, though in the

1918

DAKAS KHAN v. GHULAM KASIM KHAN.

view they take this aspect of the case calls for no elaboration.

The Judicial Commissioner has affirmed so much of the First Court's decree as declared clause 14 of the wajib-ul-arz to be still operative, but it follows from what he had previously determined that its legal effect would be in accordance with his view and not that of the First Court as to its true interpretation. The rights thus secured to the plaintiffs are not of as high a degree as they claimed, yet they are probably substantial. Any attempt, however, at a definition of them would be outside the scope of this appeal, for the determination of their meaning, as the Judicial Commissioner has indicated, is more a matter for the Revenue authorities, should the occasion ever arise.

The result, then, is that their Lordships will humbly advise His Majesty that this appeal be dismissed, but without costs, as the respondents have not appeared.

Appeal dismissed.

Solicitors for the appellants: *Hughes & Sons*

J. V. W.

PRIVY COUNCIL

DEBENDRA NATH DAS

v.

BIBUDHENDRA MANSINGH BHRAMARBAR ROY.

P.C. 1918

Feb. 7.

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Bengal Tenancy Act (VIII of 1885) s. 5, sub-ss (1), (4) (b) and (5) and s. 103 B—Status of tenant, whether tenure-holder or raiyat—Purpose for which land was acquired and extent of holding or tenure—Mode of determining status—Presumption of correctness of entry in Record of Rights—Rebuttal of, by proof of attendant circumstances showing incorrectness.

The defendant held more than 250 acres of land in a village which formed part of the plaintiff's zemindari in the district of Cuttack, under a lease granted by the plaintiff's predecessor in title in 1901 to a person who assigned it to the defendant in 1907. In proceedings taken to prepare the "Record of Rights" for the land covered by the lease, the defendant was entered as a tenure-holder, but on his objection the Assistant Settlement Officer recorded him as a "settled raiyat at a fixed rent." The lease was an ordinary reclamation lease of the land permanently to the lessee at a fixed rent "to make it fit for cultivation according to your will and you shall hold the same by cultivating it or having it cultivated, and you shall be competent to make such other arrangements or adopt such other convenient steps as you consider necessary for cultivating the same." In a suit brought under the provisions of section 106 of the Bengal Tenancy Act (VIII of 1885) for rectification of the entry by recording the defendant as tenure-holder :—

Held, on the construction of the Act, that in determining the status of a tenant, whether he is a tenure-holder or a raiyat, what has to be considered is (*a*) the purpose for which the land was acquired, and (*b*) the extent of the tenure or holding. Fixity of rent was no criterion for the determination of that question, for a tenure may be held at a fixed rent

* *Present* : Lord Buckmaster, Mr. Ameer Ali and Sir Walter Phillimore, Bart.

1918

DEBENDRA NATH DAS v. BIBUDHENDRA MANSINGH BHRAMARBAR ROY.

equally with a raiyati holding. The statutory presumption under s. 5 sub-s. (5) applied to the defendant as holding more than 100 acres, and the purpose appeared to be that the land should not be cultivated by the personal agency of the defendant himself. Here the land was leased to a man of means, a resident of another place, for the purpose of reclaiming the land and rendering it fit for cultivation, the agency to be employed for cultivating it being left to his discretion. The Courts were right in looking at the attendant circumstances to judge of the purpose for which the lease was acquired and to determine the status of the defendant. The presumption under s. 103 B that an entry in a "Record of Rights" finally published "shall be presumed to be correct until it is proved by evidence to be incorrect," was fully rebutted by the circumstances referred to by the majority of the Courts in India in arriving at the conclusion that the defendant was a tenure-holder and not a raiyat.

APPEAL 83 of 1917 from a judgment and decree (11th July 1913) of the High Court at Calcutta which reversed a decree (16th July 1912) of a single Judge of the same Court, and restored a decree (16th August 1909) of the Special Judge of Cuttack, which had affirmed a decree (20th December 1907) of the Settlement Officer of Dompara, Cuttack.

The defendant was the appellant to His Majesty in Council.

The appellant holds certain lands in a village named Goyalbank, in Killa Dompara, in the District of Cuttack of which the respondent is proprietor, as assignee of a lease granted by the respondent on the 7th June 1901 : and the main question for determination is whether the appellant is in respect of these lands a tenure-holder, or, as he claims to be, a raiyat within the meaning of the Bengal Tenancy Act (VIII of 1885).

The area of the land leased was 257 acres of which about 100 acres were cultivable. The lease was a reclamation lease of which the material clauses were clause 1, under which the lessee was to bring the lands under cultivation at his own expense, and by

his own efforts : clause 3 by the terms of which no rent was to be paid (except for fishery rights) during the first five years : clauses 5 and 6 under which after the expiration of the five years, rent was to be paid at the fixed rate of 12 annas 6 pies per acre for all land brought under cultivation, and that rent was never to be enhanced : clause 5 which stipulated that the lessee was to be at liberty to relinquish the land if he found any inconvenience in cultivating it : and clause 9 by which the lessee was to make the cultivable land fit for cultivation, and hold the same by cultivating it, or having it cultivated, or by taking such other steps for cultivating it, as he might consider necessary.

The lessee brought under cultivation about 106 acres of the land, by cutting a canal and constructing a bund on it at considerable expense, and at first cultivated it himself and afterwards by under-raiyats to whom he supplied seeds, etc.. for this purpose, the under-raiyats giving him a share of the produce, agreed upon between them.

The lessee assigned his interest to the appellant on 7th January 1907, and in February of that year during the preparation of the record of rights (wajib-ul-arz) by the Assistant Settlement Officer, the latter recorded the appellant as a settled raiyat ; and the cultivators under him as " shikmi " or subordinate raiyats in respect of the lands in suit. The cultivator made no objection to this entry, but the Director of Land Records doubted if it was correct and at his instance the lessor on 3rd October 1907, instituted against the appellant the suit which gave rise to this appeal, in the Court of the Settlement Officer of Dompara, under section 106 of the Bengal Tenancy Act, claiming that the entry in the record of rights was erroneous, and that the appellant should have been entered as a

1918.

DEBENDRA NATH DAS v. BIBUDHENDRA MANSINGH BHRAMARBAR ROY.

tenure-holder. The under-raiyats were not made parties to the suit.

The appellant's defences to the suit were that the suit was not maintainable, and that the entry in the record was correct.

The Settlement Officer decided that the entry must be presumed to be correct until the contrary was proved, but he held that having regard to the facts of the case (*a*) that though the lease was a reclamation lease, and the lessee was first to make the land cultivable at his own expense, and then had cultivated it himself, or had it cultivated by others, he had in fact brought the lands under cultivation by the help of a large number of tenants who still held them; (*b*) that the position of the appellant and his permanent residence at Cuttack made it clear that he only intended to bring the land under cultivation by establishing tenants on it, and to enjoy the income of it himself as a middleman; and (*c*) that the area of the lands being over 100 bighas, the appellant must be held to be a tenure-holder under section 5, sub-section (*5*) of the Act, until the contrary was shown. The Settlement Officer accordingly held the appellant to be a tenure-holder and decreed the suit with costs.

An appeal from that decision to the Special Judge of Cuttack was dismissed, and the appellant preferred an appeal to the High Court which was heard by RICHARDSON J., sitting alone, who held on the construction of the lease as a whole, and with regard to the circumstances to which it applied, its primary purpose was that the lessee should bring the lands under cultivation by his own efforts, and that he was fairly entitled, therefore, as against the lessor to claim the status of a raiyat. He consequently allowed the appeal and dismissed the suit.

The respondents appealed to a Division Bench of the High Court (SIR LAWRENCE JENKINS C. J. and SIR ASUTOSH MOOKERJEE J.) who allowed the appeal, and restored the decree of the Special Judge.

The judgment now appealed from was so far as material as follows:—

The area covered by the lease exceeds 100 bighas. Consequently, the presumption mentioned in sub-section (*5*) of section 5 of the Bengal Tenancy Act, is applicable. That sub-section provides that 'where' as here, 'the area held by a tenant exceeds 100 standard bighas, the tenant *shall* be presumed to be a tenure-holder until the contrary is shown.' It is consequently obligatory upon the Court to presume that the defendant is a tenure-holder. The only question for determination is whether the contrary has been shown. The defendant in support of the contrary view relies upon the terms of the lease of the 7th of June 1901. He lays special stress upon the first clause of the lease, which shows that the grant was made to the defendant in order that he might cultivate the land after making it fit for cultivation at his own expense and by his own efforts. It has been argued that the intention of the grantor was that the land should be rendered fit for cultivation and subsequently be cultivated by the grantee himself. This contention, however, is negatived by the 9th clause of the lease, which provides that 'the grantee may enjoy the land by cultivating it or having it cultivated and that it will be competent to the grantee to make such other arrangements or adopt such other means as he might consider necessary for cultivating the same and that the grantor would not raise any objection thereto.' It was, therefore, competent to the grantee to cultivate the land himself or to have the land cultivated by means of under-tenants. Consequently, it is impossible to say that the terms of the lease negative the statutory presumption.

"The case for the respondent is not strengthened by reference to the definition of the term 'tenure-holder.' Sub-section (*1*) of section 5 provides that "tenure-holder means *primarily* a person who has acquired from a proprietor or from another tenure-holder a right to hold land for the purpose of collecting rent or bringing it under cultivation by establishing tenants on it, and includes also the successors-in-interest of persons who have acquired such a right." It is plain from the very terms of this definition that it is not exhaustive. The word 'primarily' indicates that this is not an exclusive definition. A person who has acquired from a proprietor a right to hold land for the purpose of collecting rents or bringing it under cultivation by establishing tenants on it is *primâ facie*

1918

DEBENDRA NATH DAS v. BIBUDHENDRA MANSINGH BHRAMARBAR ROY.

within the definition, but there may be other persons who are tenure-holders, although they may not have acquired a right to hold land for the purpose of collecting rents or bringing it under cultivation by establishing tenants on it ; in other words, it is possible for a person to be a tenure-holder, although a part of the land in his occupation is cultivated by himself and was intended to be cultivated by himself. In the case before us, it has been found that the land has been cultivated by under-tenants of the defendant. That is perfectly consistent with the inference that the defendant is a tenure-holder, although he has reserved a portion of the land to be cultivated by himself or by his servants. We are, therefore, of opinion that the statutory presumption has not been rebutted.

On the other hand, there are indications in the lease itself that the grant could never have been intended to be raiyati grant. In the first place the grant was for the purpose of reclamation, and the grantee was expected to reclaim the land at his own expense. His position, consequently, would hardly be intended to be as precarious as that of a non-occupancy raiyat. In the second place there was a period of remission fixed, during which no rent was to be paid on account of the land itself. This is a term which usually finds place in leases of tenures. In the third place, the rate of rent itself was fixed in perpetuity, and a premium was paid by the grantee to the grantor. Taken as a whole the lease, in our opinion, makes it reasonably plain that the grant was intended to be that of a tenure. We must hold that a correct view of the status of the defendant was taken by the Assistant Settlement Officer, and the Special Judge, and the judgment of the Special Judge ought not to have been reversed in second appeal. The view we take is supported by the observations of Lord Davey in the case of *Gokul Mandar* v. *Pulmanund Singh* (1).

On this appeal.

De Gruyther, *K.C.* and *Sir William Garth*, for the appellant, contended that on the proper construction of the lease and of the Bengal Tenancy Act, and on the facts of the case, the appellant should have been held to be a raiyat at a fixed rate of rent and not a tenure-holder. The arguments were mainly on the construction of the Act of which ss. 4, 5 sub ss. (*1*), *4*(*b*) and (*5*), 101, 102, 103, 103*b* and 106 were referred to. The purpose for which the land was leased, was, it was

(1) (1902) I. L. R. 29 Calc. 707 ; L. R. 29 I. A. 196.

submitted, the best test whether the appellant is a tenure-holder, or a raiyat: here the land was leased originally for the purpose of cultivation by the lessee; and it was a raiyati lease notwithstanding it was subsequently sublet. Reference was made to *Durga Prosonno Ghose* v. *Kali Das Dut* (1), *Laidley* v. *Gour Gobind Sirkar* (2), *Promoda Nath Roy* v. *Asiruddin Mandal* (3), and *Gokul Mandar* v. *Pudmanund Singh* (4). The entry of the appellant originally as a raiyat in the record-of-rights must be presumed under section 103(*b*) to be correct, as it has not been proved to be incorrect.

Sir H. Erle Richards, *K.C.*, and *O'Gorman*, for the respondent, were not called upon.

The judgment of their Lordships was delivered by

Feb. 7.

MR. AMEER ALI. The sole question involved in this appeal is whether the defendant-appellant is a "tenure-holder" or *raiyat* as defined in the Bengal Tenancy Act (VIII of 1885).

The defendant holds over 250 acres of land in the village of Goyalbank, forming part of the plaintiff's zemindari in the district of Cuttack, under a lease granted by the predecessor of the plaintiff in 1901 to one Gokulananda Chowdhury. In 1907 Gokulananda assigned the lease to the defendant.

The land covered by the lease became about the same time the subject of "record-of-rights" proceedings instituted by Government under Chapter X of the Act.

These proceedings are taken by the revenue authorities before special officers for the ascertainment and record of all rights connected with the land within the ambit of the enquiry. At the initial stage

(1) (1881) 9 C. L. R. 449, 451.
(2) (1885) I. L. R. 11 Calc. 501, 506.
(3) (1911) 15 C. W. N. 896.
(4) (1902) I. L. R. 29 Calc. 707; L. R. 29 I. A. 196.

1918

DEBENDRA NATH DAS v. BIBUDHENDRA MANSINGH BHRAMARBAR ROY.

of the proceedings, the defendant was entered as a "tenure-holder," but subsequently on his objection the Assistant Settlement Officer recorded him as "a settled *raiyat* at a fixed rent."

The present suit has been brought under the provisions of section 106 on behalf of the zemindar for rectification of the entry by recording the defendant as a "tenure-holder." The suit was first heard by the Settlement Officer, who upheld the plaintiff's contention as to the status of the defendant, and his decision was confirmed on appeal by the Special Judge of Cuttack. The defendant then preferred a second appeal to the High Court of Calcutta, which came for hearing before Richardson J. The defendant renewed before that learned Judge his contention that under the terms of his lease he was entitled to be classed as a *raiyat*. Richardson J. accepted his contention and reversed the order of the Special Judge, the effect of which was that the entry in the record-of-rights remained as made by the Assistant Settlement Officer.

An appeal was thereupon preferred by the respondent under section 15 of the Letters Patent, which came on for hearing before two Judges of the High Court, Jenkins C.J. and Mookerjee J., who, differing from Richardson J., held, in concurrence with the Settlement Officer and the Special Judge, that the defendant was a tenure-holder. They accordingly reversed the order of that learned Judge, and restored the decree of the lower Courts for the rectification of the entry in the record-of-rights.

The present appeal to His Majesty in Council, which forms the sixth stage of this litigation, is an indication not merely of the persistency of the defendant, but also of the valuable rights that are attached to his claim, for, if he be a tenure-holder, persons holding under him would have the status of *raiyats*

and would be entitled to acquire, after a certain efflux of time, the right of occupancy under the Act. Whereas, if he be a *raiyat*, those persons would only be *under-raiyats*, without the privileges or security afforded by the Act to *raiyats*.

For the purposes of the Tenancy Act, tenants are classed under three heads, viz., tenure-holders, *raiyats*, and *under-raiyats*, that is to say, tenants holding, whether mediately or immediately, under *raiyats*. *Raiyats*, again, are divided into three sub-classes, *i.e.*, (*a*) *raiyats* holding at fixed rates, (*b*) occupancy *raiyats*, and (*c*) non-occupancy *raiyats*. The defendant has been entered as a settled *raiyat* at a fixed rent, evidently on the ground that under the lease the rent payable by him is permanently fixed. But it is to be observed that fixity of rent is no criterion for the determination of the point at issue, for a tenure may be held at a fixed rent equally with a *raiyati* holding. The question must, therefore, be decided on other considerations.

Sub-section (*1*) of section 5 defines a tenure-holder to mean :—

"Primarily a person who has acquired from a proprietor or from another tenure-holder a right to hold land for the purpose of collecting rents or bringing it under cultivation by establishing tenants on it, and includes also the successors in interest of persons who have acquired such a right."

And a *raiyat* is defined to mean :—

"Primarily a person who has acquired a right to hold land for the purpose of cultivating it by himself, or by members of his family, or by hired servants, or with the aid of partners, and includes also the successors in interest of persons who have acquired such a right."

Sub-section (*4*) provides certain rules for determining whether a tenant is a "tenure-holder" or "*raiyat*." Clause (*b*) is important : it says, "The Court shall have regard to the purpose for which the right of tenancy was originally acquired." Sub-section (*5*)

1918

DEBENDRA NATH DAS v. BIBUDHENDRA MANSINGH BHRAMARBAR ROY.

is equally important. It provides that where the area held by a tenant exceeds 100 standard *bighas* (a little over 33 acres) "the tenant shall be presumed to be a tenure-holder until the contrary is proved." In determining the status, therefore, of a tenant, viz., whether he is a tenure-holder or a *raiyat*, two elements have to be borne in mind, *first*, the purpose for which the land was acquired, and, *secondly*, the extent of the tenure or holding. A close examination of the definition-clauses makes it quite obvious that both these elements are closely inter-related. The law assumes the *raiyat* to be the actual cultivator of the soil, either by his own labour or the labour of members of his family or by hired labourers, and it assumes also that ordinarily a larger area than 100 *bighas* would make cultivation by the personal agency of the tenant improbable. The presumption provided in sub-section (*5*) of section 5 is founded on that hypothesis.

In the present case, the land held by the defendant amounts to more than 250 acres; the statutory presumption certainly applies to him. He seeks to rebut it by referring to the purpose for which the lease was granted. The terms of the document have been carefully examined by the Settlement Officer, the Special Judge and the High Court. Their Lordships will, therefore, confine their remarks to its general features. It is an ordinary reclamation lease; it leases the land permanently to the lessee at a fixed rent to cultivate the same, after making it fit for cultivation at his own expense and by his own efforts. In other words, he is to reclaim the land at his own expense and bring it under cultivation. The ninth clause makes this quite clear. It says:—

"You shall, by reserving water and raising *bandhs* [on the land leased,] make it fit for cultivation according to your will, and shall hold the same

by cultivating it or having it cultivated, and you shall be competent to make such other arrangement or adopt such other convenient steps as you consider necessary for cultivating the same."

The employment of the agency for the cultivation is left entirely to the option of the lessee; the land was leased for cultivation, that is, for agricultural purposes, but the agency to be employed is to be determined by the lessee; he has the power to establish *raiyats* or under-lease it to others or cultivate it himself, if he can. It cannot be said that the purpose is, primarily or otherwise, that the demised land should be cultivated by his personal agency. At the best, the lease may be said to be equivocal. In their Lordships' opinion, the High Court and the lower Courts were perfectly right to look to the attendant circumstances to judge of the purpose for which the lease was acquired and to determine the status of the defendant. Apart from the facts appearing in the lease to which the learned Judges of the High Court have referred as indicating that the land was being taken for purposes other than that of personal and direct cultivation as a *raiyat*, there is the outstanding circumstance that the land was leased to a man of means who appears to be a resident of another place for the purpose of reclamation and render ing fit for cultivation, the agency to be employed for carrying on the cultivation being left to his discretion.

Their Lordships think that the presumption under section 103B, on which the defendant relies, that an entry in a record-of-rights finally published "shall be presumed to be correct until it is proved by evidence to be incorrect," is fully rebutted by the circumstances to which the Courts in India have referred in arriving at the conclusion that the defendant was a tenure-holder and not a *raiyat*.

1918

DEBENDRA NATH DAS v. BIBUDHENDRA MANSINGH BHRAMARBAR ROY.

Their Lordships are of opinion that this appeal should be dismissed with costs and that they will humbly advise His Majesty accordingly.

J. V. W. *Appeal dismissed.*

Solicitor for the appellant: *Edward Dalgado.*

Solicitor for the respondent: *Solicitor, India Office.*

CRIMINAL REVISION.

Before Chitty and Richardson JJ.

1917

Aug. 24.

ASLAM MEAH

v.

EMPEROR*

Compromise—Petition of compromise presented to the Magistrate while writing judgment—Duty of Magistrate to accept, and give effect to, the petition—Criminal Procedure Code (Act V of 1898) s. 345.

Under s. 345 of the Criminal Procedure Code, a case may be compounded at any time before sentence is pronounced. A Magistrate, therefore, cannot refuse to accept a petition of compromise presented to him whilst he is writing the judgment.

THE petitioners, who were related to the complainant and lived together in the same house, were tried by Mr. B. K. Sen, an Honorary Magistrate of Noakhali, on a charge under s. 323 of the Penal Code, of assaulting the complainant. After the trial was over, and while the Magistrate was writing the judgment, the parties presented a petition of compromise, but he ordered the same to be filed, continued writing, and completed the judgment, convicting the petitioners and sentencing them to a fine on the 21st May 1917. During

*Criminal Revision No. 906 of 1917, against the order of P. Sen, Offg. Magistrate of Noakhali, dated June 14, 1917.

1917

ASLAM MEAH v. EMPEROR.

the hearing of the appeal to the District Magistrate, he directed a fresh petition of compromise to be filed before him, but the parties were unable to do so, owing to the absence of the complainant from the Court. The District Magistrate, thereupon, dismissed the appeal by his order dated 14th June 1917. The petitioner then moved the High Court and obtained the present Rule.

Babu Santosh Kumar Bose, for the petitioners.

No one appeared for the opposite party.

CHITTY AND RICHARDSON JJ. In this case the opposite party, on whom the Rule was also served, does not appear to show cause. In his explanation the Magistrate, before whom the case was tried, states that he does not think that the compromise petition could be accepted at such a late stage, when the judgment was actually being written; but a case may be compromised under section 345 of the Code of Criminal Procedure at any time before the sentence is pronounced. We, accordingly, make the Rule absolute and set aside the conviction and the sentence passed on the petitioners. The fines, if paid, will be refunded.

E. H. M. *Rule absolute.*

APPEAL FROM ORIGINAL CIVIL.

Before Sanderson C. J. and Woodroffe J.

1917

Dec. 17

MURALIDHAR CHAMARIA

v.

M. R. DALMIA.*

Appeal—Jurisdiction—Written statement, order refusing leave to file—"Judgment"—Letters Patent, 1865, cl. 15—Rules and Orders of High Court, Chap. XIV, r. 3.

No appeal lies from an order made by a Judge sitting on the Original Side, refusing an application by a defendant for leave to file his written statement. Such an order is not a "judgment" within the meaning of clause 15 of the Letters Patent of 1865.

The Justices of the Peace for Calcutta v. *The Oriental Gas Company* (1) referred to.

Mathura Sundari Dasi v. *Haran Chandra Saha* (2) distinguished.

THIS was an appeal from an order made by GREAVES J. refusing an application by the defendant for leave to file his written statement.

On the 14th August 1917, Messrs. M. R. Dalmia & Co. brought a suit against Muralidhar Chamaria praying for a decree that the defendant be ordered, *inter alia*, to return certain scrip alleged to have been taken by him on loan or to pay the value thereof estimated at Rs. 27,300. The plaint was served on the defendant on the 21st August and the defendant was required to file his written statement within two weeks from the date of such service. The defendant put in appearance on the 29th August but failed to file his written statement. On the 26th November,

* Appeal from Original Civil, No. 98 of 1917, in Suit No. 954 of 1917.

(1) (1872) 8 B. L. R. 433. (2) (1915) I. L. R. 43 Calc. 857.

1917

MURALIDHAR CHAMARIA v. DALMIA.

on the application of the plaintiffs an order was passed by the Registrar directing that the defendant should file his written statement within a week and that in default the suit should be transferred to the list of undefended causes. The defendant failed to file his written statement within the time prescribed, and on the 10th December applied to Greaves J. for leave to file his written statement denying the plaintiffs' claim and offered to pay costs. The application was refused. From this order the present appeal was preferred.

Mr. C. C. Ghose (with him *Mr. S. C. Bose*), for the appellant. An appeal lies from the order of Greaves J. It is a "judgment" within the meaning of clause 15 of the Letters Patent, as it finally adjudicates on the right of the defendant to file his written statement: *The Justices of the Peace for Calcutta* v. *The Oriental Gas Company* (1), *Mathura Sundari Dasi* v. *Haran Chandra Saha* (2). I admit that it will be open to the defendant on appeal from the decree to challenge the correctness of the present order. Even where there is irregularity in putting in a defence, the Court will not disregard it: *Gibbings* v. *Strong* (3).

Mr. Langford James (with him *Mr. B. K. Ghosh*), for the respondents. No appeal lies from the order of Greaves J. It is not a "judgment" within the meaning of clause 15 of the Letters Patent. The effect of the order is set out in rule 3 of Chapter XIV of the Rules and Orders of the High Court. There has been no adjudication on the merits of the case: *The Justices of the Peace for Calcutta* v. *The Oriental Gas Company* (1), *Kishen Pershad Panday* v. *Tilukdhari Lall* (4), and *Gobinda Lal Das* v. *Shiba Das Chatterjee* (5).

(1) (1872) 8 B. L. R. 433.
(2) (1915) I. L. R. 43 Calc. 857.
(3) (1884) L. R. 26 Ch. D. 66.
(4) (1890) I. L. R. 18 Calc. 182.
(5) (1906) I. L. R. 33 Calc. 1323.

1917

MURALIDHAR CHAMARIA v. DALMIA.

SANDERSON C. J. This is an appeal from an order which was made by my learned brother Mr. Justice Greaves on the 10th of December this year, by which he refused an application by the defendant for leave to file his written statement.

The material dates are as follows: The plaint was filed on the 14th of August 1917: it was served on the defendant on the 21st of August, and the defendant was required to put in his written statement within two weeks from the date of service, so that he should have filed his written statement on or about the 4th of September this year I ought to have mentioned that the defendant appeared on the 29th of August. He did not put in his written statement within the specified time: and on the 26th of November the plaintiff applied for an order that the defendant should be required to file his written statement: and on that date the Registrar made the following order: "It is ordered that the defendant do within one week from the date hereof file his written statement in this suit and that in default thereof this suit be transferred from the list of defended suits to the list of undefended suits". The time for filing the written statement expired on the 3rd of December 1917, and by that time the defendant did not file his written statement. On the 10th of December, the defendant made the application to Mr. Justice Greaves to which I have already referred, and it was upon that application that the learned Judge refused leave to him to file his written statement.

Now, the first matter that we have to consider in this case is whether there is any right of appeal from the order of the learned Judge.

It is contended by the learned counsel for the appellant, Mr. C. C. Ghose, that Mr. Justice Greaves' order is a "judgment" within the meaning of clause

15 of the Letters Patent, and he bases his argument upon the ground that it finally decides a right which the defendant had, of filing his written statement, and after he obtained that right, of appearing by counsel at the hearing of the suit, of calling evidence at the hearing of the suit, and having his case fully investigated.

The result of the order of the Registrar, which was made on the 26th of November 1917, is described in rule 3, chapter XIV of the Rules of the High Court, Original Side (page 189 of Mr. Hechle's Book, 1914 edition). It is this: "Where a suit is heard *ex parte* against any defendant, such defendant may be allowed to cross-examine, in person, the plaintiff's witnesses, and to address the Court, but, unless the Court otherwise specially orders, evidence will not be received on his behalf, nor will he be allowed the assistance of counsel or attorney".

Now, the definition of "judgment" in clause 15 of the Letters Patent has been referred to so often that I think one of the learned Judges said that it has become classical. It is that which is to be found in the judgment of Sir Richard Couch, in the case of *The Justices of the Peace for Calcutta* v. *The Oriental Gas Company* (1), where he says: "We think that 'judgment' in clause 15 means a decision which affects the merits of the question between the parties by determining some right or liability. It may be either final or preliminary or interlocutory, the difference between them being that a final judgment determines the whole cause or suit, and a preliminary or interlocutory judgment determines only a part of it, leaving other matters to be determined".

Now, the question is whether, having regard to that definition (which, it is true, has been said to

(1) (1872) 8 B. L. R. 433, 452.

1917

MURALIDHAR CHAMARIA v. DALMIA.

SANDERSON C. J.

be not exhaustive), the order which was made in the case would come within the meaning of the word "judgment". Does this order affect the merits of the question between the parties by determining some right? It is to be noticed that the right of the defendant to put in his written statement had gone—he ought to have put it in on or about the 4th of September—but then there was an order of the Court allowing him further time, which time expired on the 3rd of December, and he was asking the learned Judge to revive, if I may use the word, the right which had passed away. But there is a further consideration which affects my mind, and it is this: I fail to understand how it can be said that the refusal of the learned Judge to allow the defendant to file his written statement can be said to affect the merits of the question between the parties by determining some right. It has been pointed out during the course of the argument that this order of the learned Judge does not decide the merits of the question between the parties: the case has to be tried on the merits. It is true that it has to be tried as an undefended suit: but the defendant has a right of appearing in person, and cross-examining the witnesses called for the plaintiff. He may obtain leave of the Judge to appear by counsel, and to call witnesses. At all events, the matter has to be investigated and judicially determined, and it may be that the plaintiff may fail in the suit. On the other hand, it may be that the plaintiff may succeed in the suit, and, if he succeeds in the suit, the defendant will have a right of appeal against the decree which will be passed against him: and, it has been admitted by the learned counsel for the appellant, Mr. C. C. Ghose, that if that should happen, the appellant would be entitled at the hearing of the appeal from the final decree, to challenge the

1917

MURALIDHAR CHAMARIA v. DALMIA.

SANDERSON C. J.

correctness of the order which my learned brother, Mr. Justice Greaves, made on the 10th of December.

Under these circumstances, I do not think that the order of Mr. Justice Greaves refusing leave to the defendant to file his written statement is a "judgment" within the meaning of clause 15 of the Letters Patent.

There is only one other word which I wish to add. Reliance was placed upon the case of *Muthura Sundari Dassi* v. *Haran Chandra Saha* (1), and it was argued that the decision in that case covered the present one. I do not agree with that. I think that the facts in that case were entirely different; and that it does not cover the case now under consideration. For these reasons I think that this appeal should be dismissed with costs.

WOODROFFE J. There is yet no final decision on the merits of the case: it is not certain that there will be a decision adverse to the defendant; for, even if the suit were heard *ex parte*, it does not follow that the plaintiff will get a decree.

Nextly, the Court can give the special leave referred to in Chapter XIV, rule 3, of the Original Side Rules, if the appellant before us appears in Court and asks the Judge to exercise the powers under that rule. It may be under those circumstances that the determination of the question which has been argued before us to-day will prove wholly unnecessary—a circumstance which to my mind indicates that this is not an order against which there is a present right of appeal.

Nextly, in my opinion, the appeal from a decree opens out the question of the correctness of all interlocutory orders passed in the suit leading up to such a decree, unless any principle intervenes similar to that

(1) (1915) I. L. R. 43 Calc. 857.

1917

MURALIDHAR CHAMARIA v. DALMIA.

WOODROFFE J.

indicated in section 97 of the Code of Civil Procedure, with regard to a preliminary decree. In the present case, if there is a decree against the defendant, I am clearly of opinion that it will be open to him on an appeal from the decree to challenge the order which he now appeals from. If it be said that owing to the suit being heard *ex parte* the evidence is all one way, the obvious answer seems to me to be that if the evidence is all one way it is because he should have been allowed to give his evidence, and that therefore he should be entitled to question the validity of the order by which the suit took this *ex parte* form.

It may be noted that there is no appeal from such an order as that now before us, in the case of the mofussil Courts, no appeal having been provided by the Civil Procedure Code, a circumstance which has some bearing upon the question whether this is the kind of order against which an appeal should be held to be under the Letters Patent. If, however, it were to be held that it was not open to the defendant in an appeal from the decree to raise the question of the validity of the order now in dispute, it would follow as regards cases in the mofussil that practically a suit might be decided against a party without any right of appeal. As, therefore, in my opinion, this order can be challenged in any appeal from the final decree in this case, that is another reason why we should hold that no appeal lies.

I, therefore, hold that no appeal lies, and that this appeal should be dismissed with costs.

J. C. *Appeal dismissed.*

Attorneys for the appellant: *Dey & Kshatriya.*

Attorneys for the respondents: *O. C. Ganguly & Co.*

APPELLATE CRIMINAL.

Before Richardson and Beachcroft JJ.

ELAHI BAKSH KAZI

v.

EMPEROR.*

1918

Jan. 29.

Deposition—Admissibility of deposition when not taken in accordance with law on subsequent trial for abetment of forgery and of user—Deposition signed by Judge and witness—No cross-examination on the point at the trial—Presumption of compliance with the law—Civil Procedure Code (Act V of 1908), O. XVIII, rr. 5, 6—Evidence Act (I of 1872) ss. 80, 91.

The provisions of O. XVIII, rr. 5 and 6 of the Civil Procedure Code (Act V of 1908) are directory, and non-compliance therewith does not render the deposition inadmissible on a subsequent trial of the deponent either for giving false evidence or for abetment of forgery and of dishonest user of a bond proved by him in the course of a civil suit.

Empress v. *Mayadeb Gossami* (1), *Kamatchinathan Chetty* v. *Emperor* (2), and *Emperor* v. *Jogendra Nath Ghose* (3) discussed.

Bogra v. *Emperor* (4) approved.

If a deposition has not been read over to the witness, in the presence of the presiding Judge, it does not prove itself under s. 80 of the Evidence Act, but it may still be proved in some other way, *e.g.*, by the Judge who recorded it or by the admission of the deponent.

Section 91 of the Evidence Act, even if it covers a deposition, merely excludes oral evidence of its contents, but does not make the document inadmissible in evidence, nor does it deal with the question of its mode of proof otherwise.

Where the deposition bore the signatures of the presiding Judge and of the deponent in his own vernacular, and the Judge and a pleader for the defendant, on whose behalf the appellant had deposed, were examined at the

* Criminal Appeal No. 713 of 1917, against the order of S. E. Stinton, Additional Sessions Judge of Dacca, dated Sep. 26, 1917.

(1) (1881) I. L. R. 6 Calc. 762.
(2) (1904) I. L. R. 28 Mad. 308.
(3) (1914) I. L R. 42 Calc. 240.
(4) (1910) I. L. R. 34 Mad. 141.

1918

ELAHI BAKSH KAZI v. EMPEROR.

Sessions trial, but not cross-examined by the latter to show that the deposition had not been read over to him in the presence of the presiding officer, and there was nothing to the contrary on the record of the Sessions trial :—

Held, that the inference was that the deposition had been so read over to the deponent.

Per BEACHCROFT J. A Court is not precluded from ascertaining from the document itself what is in it merely because the contents may not in fact be correct. Failure to ensure the accuracy of the record may create doubt as to the correctness of its contents, but does not affect its admissibility when it is otherwise proved.

THE story of the prosecution was that, on the 19th September 1909, Sridam Gope and his three brothers jointly executed seven money bonds for Rs. 648, in the aggregate, in favour of Nakari Gope, the amount having been found due from them on account of previous bonds. Nakari died shortly after and his son, Mahim Chandra Gope, brought a suit in the Court of the Second Munsif of Munshigunge, on the 15th August 1913, on these bonds, against Sridam and his brothers. By their written statement, filed on the 18th November, the defendants denied the genuineness of the plaintiff's bonds, and set up in place of them seven other bonds dated the same day and for the same amount, but purporting to be for cash advanced, and bearing endorsements of payment and return of the bonds on the 13th April 1913. The suit was transferred to, and came on for hearing before, Babu Upendra Chandra Ghose, the Registrar-Munsif of Munshigunge. The appellant was examined in the course of the trial, on the 30th March 1914, as the second defence witness. He proved the execution of the defendants' bonds, admitted that he was the writer of them, and stated that he had witnessed the payment of cash, and the signatures of the witnesses. The Munsif found the defendants' bonds to have been forged and decreed the suit. An appeal against the decree was dismissed, Mahim thereupon applied to the Munsif for sanction to prosecute

the four executants and the appellant, which was refused. On the motion of Mahim, the District Judge of Dacca, Mr. M. Smither, directed the prosecution of these persons under section 476 of the Criminal Procedure Code. Sridam and his brothers were put on trial and the former was convicted of forgery and sentenced to seven years' imprisonment, the others having been acquitted.

The appellant was subsequently tried by Babu Adwaita Charan Samanta, Deputy Magistrate of Dacca, under s. 193 of the Penal Code, in respect of the evidence given by him in Mahim's civil suit. Bissessar Rai, the then bench-clerk of the Registrar-Munsif, was examined for the prosecution, on the 15th June 1917, and deposed as follows :—

Elahi Baksh deposed on oath in my presence. The practice is that after the deposition is recorded, it is read over and explained in Bengali to the deponent who next signs his name on it. (*Cross-examination before the charge*) As I am very busy, I send the deposition and the witness to the office where it is read over and explained in Bengali. The witness next signs on the deposition. Elahi Baksh did not sign in my presence. . . (*Cross-examination after charge*) I have no independent recollection of what occurred. . . I read depositions to witnesses if I get time. . . (*To Court*) : The certificate—'*read over and admitted correct*'—is sometimes not given by mistake, though as a matter of fact it is actually done. I am positive I did not read over Ex. 7 to Elahi Baksh."

On the 8th August 1917, the Deputy Magistrate found, upon the evidence of this witness, that the appellant's deposition of the 30th March 1914 (Ex. 7 before the Magistrate—marked Ex. 27 at the Sessions trial) had not been read over to the deponent in the presence of the presiding Judge, in accordance with O. XVIII, r. 5 of the Civil Procedure Code. He held that the deposition was, in consequence, inadmissible, and acquitted the appellant.

The appellant was thereafter tried by the Additional Sessions Judge of Dacca with a Jury under

1918

ELAHI BAKSH KAZI v. EMPEROR.

ss. $\frac{467}{109}$ and $\frac{471}{109}$ of the Penal Code. Bissessar Rai was not called at the trial, but the Registrar-Munsif was examined and stated as follows:—

Elahi Baksh was D. W. 2 (in the civil suit). I recorded his deposition in full. He proved the defendants' bonds. This is his deposition (Ex. 27) [*objected to*]. *Cross-examined*: Bissessar Rai was only bench-clerk at the time.

The pleader who appeared for Sridam in the civil suit was also examined at the trial of the appellant, but was not questioned by either side as to the reading over and the interpretation of Ex. 27 to the appellant.

The Jury found the appellant guilty on both the charges, and the Judge sentenced him under each of the above sections to six years' rigorous imprisonment, concurrently. He now appealed to the High Court.

Babu Dasarathy Sanyal (with him *Babu Upendra Lal Roy*), for the appellant. The main ground of the appeal is that Ex. 27 was inadmissible, and that the rest of the evidence is insufficient for a conviction. Ex. 27 was recorded in English which the appellant does not understand. It was not read over to him in the presence of the Judge, nor interpreted in accordance with Order XVIII, rr. 5 and 6. The appellant was tried for perjury and acquitted on the ground that his deposition was inadmissible as not having been taken according to law. Refers to ss. 182, 183 of the Civil Procedure Codes of 1877 and 1882, and *Empress* v. *Mayadeb Gossami* (1), *Kamatchinathan* v. *Emperor* (2). The last case was referred to in *Bogra* v. *Emperor* (3).

Mr. Monnier, for the Crown. It has not been shown that Ex. 27 was not read over to the appellant. The

(1) (1881) I. L. R. 6 Calc. 762. (2) (1904) I. L. R. 28 Mad. 308.
(3) (1910) I. L. R. 34 Mad. 141.

Registrar-Munsif was not cross-examined by him to prove his present contention. The Munsif says he recorded the evidence in full, and the document bears the signature of the appellant. The presumption is that the formalities of the law were complied with. See Evidence Act, s. 114 Illust. (*e*). As to the rulings cited, the first two are against me, and there are other decisions to the same effect: see *Emperor* v. *Jogendra Nath Ghose* (1). But the object of rule 5 of Order XVIII is to ensure the accuracy of the recorded deposition, and the fact of the appellant having signed it amounts to an admission of its correctness. This case comes within *Bogra* v. *Emperor* (2). Refers also to *Adyan Singh* v. *Queen-Empress* (3).

RICHARDSON J. The appellant was tried before the Additional Sessions Judge of Dacca and a Jury on charges of abetment of forgery and abetment of the use of a forged document framed under sections 467 and 471 of the Indian Penal Code read in each case with section 109 of the same Code. The Jury returned a unanimous verdict of guilty on both the charges, and the learned Sessions Judge accepted the verdict and sentenced the appellant for each offence to six years' rigorous imprisonment, directing, however, that the sentences should run concurrently. The charges relate to a series of seven bonds. The case for the prosecution is that these seven bonds were forged by, or by the connivance of, one Sridam in order to take the place of seven genuine bonds. It appears that Sridam and his brothers had borrowed money from Nakari Gope, the father of Mahim Chandra Gope, the complainant in the present case. It is alleged that on the 3rd Aswin 1316 (September 1909) Sridam executed seven bonds in favour of Nakari, on which Nakari's

(1) (1914) I. L. R. 42 Calc. 240. (2) (1910) I. L. R. 34 Mad. 141.
(3) (1886) I. L. R. 13 Calc. 121.

1918

ELAHI BAKSH KAZI v. EMPEROR.

RICHARDSON J.

son Mahim (Nakari himself having in the meantime died), instituted a suit on the 15th August 1913. The suit was against Sridam and his brothers. On the 18th November 1913, the latter filed their written statement, and with it they filed the bonds which are alleged to be forged. The endorsements on the back of those bonds, purporting to show that the bonds were satisfied by payment on the 31st Chaitra 1319, are also said to be forgeries. Mahim's suit was tried by the Munsif who found that the bonds produced by the plaintiff were genuine, and that the bonds produced by the defendants with the endorsements were forged. After that decision Mahim presented an application for leave to prosecute Sridam and his brothers for forgery and other offences. The learned Munsif who tried the suit refused to grant the sanction. Mohim then moved the District Judge who, under section 476 of the Criminal Procedure Code, directed that Sridam and his brothers should be prosecuted for certain offences including forgery. A motion against that order was made to the High Court but the Court refused to entertain it. Then followed further proceedings the result of which was that Sridam and his brothers were tried for forgery and that Sridam was convicted of that offence. The order of the District Judge, under section 476 of the Criminal Procedure Code, also directed the prosecution of the present appellant Elahi Baksh Kazi. The latter was tried for perjury and was acquitted of that offence. He was then placed on his trial on the charges of which he has now been convicted.

The learned pleader for the appellant has contended before us that the trial in the Court below is vitiated by the reception of evidence which is not admissible under the law. The contention relates to the deposition of the appellant in the suit brought by Mahim

1918

ELAHI BAKSH KAZI v. EMPEROR.

RICHARDSON J.

and the point taken is that the formalities required by rules 5 and 6 of Order XVIII of the Civil Procedure Code were not observed. It is not disputed that the evidence was given on oath. But it is said that after the deposition had been written down by the Munsif it was not read over to the witness as rule 5 requires, or, at any rate, that it was not read to the witness in the presence of the Judge. Upon that it is argued that the deposition is not legally a deposition at all, and that the Judge was wrong in allowing it to go to the Jury. In support of the contention reference is made to the cases of *Empress* v. *Mayadeb Gossami* (1) and *Kamatchinathan Chetty* v. *Emperor* (2). If as a matter of fact the appellant's deposition was not interpreted and read over to him in the prescribed manner, the cases cited support the contention advanced, unless the rule laid down is to be confined, as it seems to have been in the past, to prosecutions for perjury. Our attention, however, has also been drawn to the case of *Bogra* v. *Emperor* (3) where a different note, and as it seems to me, the true note, is struck. The cases of *Empress* v. *Mayadeb Gossami* (1) and *Kamatchinathan Chetty* v. *Emperor* (2) have been followed in other cases, for instance, *Emperor* v. *Jogendra Nath Ghose* (4). Speaking for myself, however, with great respect, I am not sure that I clearly understand the principle of those decisions. Under section 80 of the Indian Evidence Act, the deposition of a witness taken in accordance with law and purporting to be signed by a Judge or Magistrate proves itself. No other proof is required than the production of the deposition. I should have thought that a provision requiring a deposition to be read over to a witness was in its nature directory, and that if it

(1) (1881) I. L. R. 6 Calc. 762.
(2) (1904) I. L. R. 28 Mad. 308.
(3) (1910) I. L. R. 34 Mad. 141.
(4) (1914) I L. R. 42 Calc. 240.

1918.

ELAHI BAKSH KAZI v. EMPEROR.

RICHARDSON J.

were not complied with in a particular case, the deposition, while it might perhaps lose the benefit of section 80 of the Evidence Act, might still be proved in some other way. No doubt section 91 of the same Act says that in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of such matter except the document itself. But even if a deposition comes within that enactment, no question arises of proving the contents of a deposition except by the production of the deposition itself. The question is how is the deposition to be proved. There is no provision in the Code of Civil Procedure which expressly precludes a deposition from being received in evidence unless it has been read over to the witness in the presence of the Judge. In the case of a document which requires registration but is not registered, it is inadmissible in evidence not by reason of the provisions of section 91 of the Evidence Act, but by reason of the express provisions on the subject contained in the Registration Act. As at present advised I can see no reason why, even in a prosecution for perjury, failure to comply with the provisions of rules 5 and 6 of Order XVIII should render a deposition entirely inadmissible in evidence, or why, if section 80 cannot be called in aid, the deposition should not be proved, for instance, by the Judge who took it down, or by the admission of the deponent. If it can be proved, in some such way, section 91 will have no application. But it is not necessary to determine this question in the present case, because the learned pleader for the appellant has not been able to satisfy me on the record as it stands that the deposition of the appellant was not in fact read over to him as the Code requires. The Munsif was put in the witness-box for the prosecution. The pleader for Sridam's

brother was also examined. Neither was asked in cross-examination whether the appellant's deposition was read over to him after it had been recorded by the Court. The deposition bears the signature of the Munsif. It also bears the signature in Bengali of the appellant. The presence of the appellant's signature at the end of the deposition certainly supports the inference that the document was read over to him. There is nothing in the record to show that this was not done. The signature was presumably affixed in token that the deposition had been correctly recorded. No doubt the words which sometimes appear at the end of a deposition—"read over and admitted to be correct"—do not appear in the present case before the appellant's signature. But the Code does not require that those words should be inserted. From my experience of the practice of the Courts below I may be more disposed to doubt whether the reading over of the deposition took place in the presence of the Munsif. But it still remains that there is no suggestion in the evidence that the law was not complied with. In my opinion, as the record stands, there is no ground for the contention that this deposition was not admissible in evidence. The point, I may add, was not taken in the Sessions Court.

As to the substance of the matter, there is no shadow of suggestion that the appellant did not say what he is recorded as having said. The objection taken to the trial is an entirely technical one, and it is conceded that, apart from this technical objection, the propriety of the appellant's conviction cannot be contested. In view of the charge of the learned Sessions Judge there appears to be no doubt, and in fact no dispute, that the appellant was the writer of the documents which have since been found to be forged documents; and if his deposition was, as

1918

ELAHI BAKSH KAZI v. EMPEROR.

RICHARDSON J.

I hold, properly received in evidence, the Jury had ample grounds for finding that the part which he took was a fraudulent and dishonest part.

The learned pleader for the appellant has asked us to use our powers under section 428 of the Criminal Procedure Code, and to examine or to direct the examination of the Peshkar of the Munsif's Court at the time when the appellant's deposition was recorded in the civil suit. In support of that application, the learned pleader has filed a copy of the deposition given by the Peshkar in the course of the trial for perjury. I have read that deposition and come to the conclusion that no useful purpose would be served by directing additional evidence to be taken at this late stage.

In the result, I would affirm the conviction. As regards the sentence, I think that four years' rigorous imprisonment would sufficiently meet the ends of justice. I would, therefore, reduce the sentence from six years' to four years' rigorous imprisonment under each charge, and maintain the order that the sentences are to run concurrently. With this modification the appeal should be dismissed.

BEACHCROFT J. I agree. I have always felt doubt as to the correctness of the decision in the case of *Empress* v. *Mayadeb Gossami* (1), and take this opportunity of endorsing the opinion expressed by my learned brother on the point decided in that and other similar cases.

Section 91 of the Evidence Act is based on the principle that the only proper evidence of the contents of a document is the document itself, and the object of the provision in Order XVIII, rule 5 of the Code of Civil Procedure requiring a deposition to be read

(1) (1881) I. L. R. 6 Calc. 762.

1918

ELAHI BAKSH KAZI v. EMPEROR

BEACHCROFT J.

over to a witness is to ensure accuracy. I confess I do not see why on principle a Court should be precluded from ascertaining what is in a document, from the document itself, merely because the contents of the document may not in fact be correct. Failure to take the necessary precautions to ensure accuracy may create doubts as to whether the record correctly represents what the witness said, but in my opinion it cannot affect the admissibility of the document in evidence, if the making of the document is otherwise proved.

E. H. M. *Appeal dismissed.*

APPELLATE CIVIL.

1918

Feb. 6.

Before Chatterjea and Walmsley JJ.

AMBALIKA DASI

v.

APARNA DASI.*

Custom—Custom and usage—Origin of custom—Existence from time immemorial—Grant purporting to create family-custom—Proof of long line of succession.

Where by a confirmatory grant, dated the 4th February 1797, a Raja after confirming a previous grant of a similar nature by his predecessor, gave to a Rani certain properties as *Joutuk Ranian Britti* and laid down in the sanad of grant that she and the future Ranis were not entitled to sell or make a gift of the *Britti* but to enjoy the profits only for life, and prescribed a rule of succession to the effect that only Ranis of the family were to succeed to the properties for life, and no Rajas could claim or alter the course of succession as aforesaid :—

Held, that the grant in so far as it laid down a rule of succession was absolutely void, as it prescribed a right of succession unknown to Hindu Law. It was also void as it purported to create successive life estates in

* Appeal from Original Decree, No. 86 of 1915, against the decree of Jogendra Nath Bose, Subordinate Judge of Khulna, dated Nov. 17, 1914.

1918

AMBALIKA DASI v. APARNA DASI.

favour of unborn persons, the estate itself being undisposed of. Even if the rule of succession laid down in the sanad of 1797, had actually been followed, it could not be treated as binding upon the family unless it had ripened into a family custom.

Held, also, that in order to establish a custom it must be shown that the custom had existed from time immemorial, and where the custom set up was peculiar only to a single family the rule was more strictly enforced than ever.

A family custom of proved antiquity was entitled to be recognised by the Courts, irrespective of the position and rank of the family, but where the origin of a custom was known it must be shown that there had been a long line of succession in accordance with the usage.

Samrun Singh v. *Khedun Singh* (1), *Pertab Deb* v. *Surrup Deb Raikut* (2), *Ramalakhshmi Ammal* v. *Sivananantha Perumal Sethurayar* (3), *Garuradhwaja Prasad Singh* v. *Superundhwaja Prasad Singh* (4), *Prince Mahomed Buktyar Shah* v. *Rani Dhojamani* (5) referred to.

APPEAL by Srimatee Ambalika Dasi and others, the defendants.

The facts are shortly these. Taraf Katia Nangla Touzi No. 1086 of the Khulna Collectorate, consisted of eight mauzas, one of them being Katia Nangla situated in Pargana Sahas. The latter belonged to Raja Barada Kant Roy of the Chanchra Raj family, who died leaving a widow Rani Durga Sundari, and three sons Jnanada Kant, Hemada Kant and Manada Kant, the last being the issue of a predeceased wife named Chandramukhi. By an Indenture of Conveyance, dated the 12th December 1892, Hemada Kant sold his one-third share of Zemindari Mahal Pargana Sahas Touzi No. 186 of the Khulna Collectorate to one Kali Prasanna Ghose, "together with a like share of and in all singular subordinate interests in the said Zemindari including the *Ranian britti* in Katia Nangla for Rs. 1,15,000". At the time of the

(1) (1814) 2 S. D. A. Sel. Rep. 116.
(2) (1818) 2 S. D. A. Sel. Rep. 249.
(3) (1872) 12 B. L. R. 396; 14 Moo. I. A. 570.
(4) (1900) I. L. R. 23 All. 37; L. R. 27 I. A. 238.
(5) (1905) 2 C. L. J. 20.

aforesaid conveyance the life estate in Taraf Katia Nangla was held by Rani Durga Sundari. In 1901, Kali Prasanna Ghose brought a suit for partition of Pargana Sahas including Taraf Katia Nangla. That suit was amicably settled and Pargana Sahas was partitioned. It was agreed, however, that Taraf Katia Nangla would remain in the possession of the Rani during her life time and that it would be partitioned after her death. Rani Durga Sundari died on the 28th December 1911. On the 27th August 1912, the executrix and executors of Kali Prasanna Ghose instituted this suit which was originally a suit for partition, but later it was converted into a title suit. The plaintiffs contended that on the death of Rani Durga Sundari they became entitled to possession of one-third of Taraf Katia Nangla. The defendants 1 to 4 who were the representatives of the brothers of Hemada Kant disclaimed all interest in the property and pleaded that Taraf Katia Nangla was the *Ranian britti* of the Ranis of the family. The defendants 6 to 9, the Ranis and wives of the defendants 1 to 4, pleaded that according to a family custom the Ranis of the family successively were entitled to it; that the male members of the family had no right to the same and consequently the plaintiffs had acquired no title thereto under the conveyance executed by Hemada Kant. These defendants further alleged that one Raja Nilkant executed a sanad of grant in favour of his step mother Rani Indra Nilmani on the 16th Sraban 1160, B.S. This sanad was not produced at the trial. Later, a confirmatory sanad was granted by Raja Srikant on the 25th Magh 1203, B. S. to his wife Rani Annapurna and his brother's wife Rani Rajeswari which contained the following: "My father the late Raja Nilkant Roy gave Taraf Katia Nangla and others in Parganah Sahas to the late

1918

AMBALIKA DASI v. APARNA DASI.

Rani Indra Nilmani as *Ranian joutuk britti* for the performance of *bratas* . . . . confirming the aforesaid *britti*, the aforesaid Katia Nangla and others included within my zemindari Pargana Sahas, is again granted to you as *joutuk britti* for your maintenance and performance of pious acts. You and the Ranis of the family shall remain in the enjoyment and possession of the aforesaid *britti* and hold the same as *lakheraj*. You or the future Ranis shall not be entitled to make a sale, gift or *hiba* of the aforesaid *britti* and shall be entitled only to enjoy the profits thereof. I or my heirs shall have no claims to or concern with the aforesaid *britti*. If I or they should at any time make any claim it shall be futile and of no effect. To this effect I grant this sanad in confirmation of the *Ranian joutuk britti*." Various other documents and records of proceedings were relied upon by these defendants and it would be unnecessary to recapitulate the same for the purposes of this report. The defendant No. 5, Hemada Kant, contended that the claim set up by defendants 6 to 9 that the property was held by the Rains in succession was false; that the property was obtained by his mother Durga Sundari by gift from one Rani Kripamoyi who held it in absolute right; that on the death of Durga Sundari, he as her sole surviving son was entitled to the whole of the Taraf; and that the plaintiffs acquired no title under the conveyance executed by him in favour of Kali Prasanna Ghose.

On the 17th November 1917, the Court of first instance held that the defendants 6 to 9 had failed to prove the family custom set up by them; that Hemada Kant had a vested interest to the extent of one-third in it at the time of the sale of his share in Parganah Sahas, but that a third share in Mauza

Katia Nangla only, and not in the whole Taraf Katia Nangla, passed under the conveyance executed by him in favour of Kali Prasanna Ghose, and passed a decree accordingly.

From that decision the defendants 6 to 9 preferred this appeal to the High Court.

Mr. B. C. Mitter (with him *Dr. Jadu Nath Kanjilal* and *Babu Bhudar Haldar*), for the appellants, contended that the orgin of the family custom and usage was traceable from the grant of 1160 B. S. But he could not prove that there was any such custom before 1160 B. S. though there must have been some arrangement prior to that date.

[CHATTERJEA J. If the custom originated with the grant of 1160 B. S., would it be valid ?]

Such a custom would be valid. See: *Prince Mahomed Buktyar Shah* v. *Rani Dhojamani* (1), *Gopalrav* v. *Trimbakrav* (2). Since the confirmatory grant of 1203 B. S. there was evidence to show that there had been a long line of succession in accordance with that custom and usage: see *Umrithnath Chowdhry* v. *Goureenath Chowdhry* (3). In *Garuradhwaja Prasad Singh* v. *Superundhwaja Prasad Singh* (4), there was a family custom existing for a period of 80 years. The Ranis in succession gave over at the end of their lives, but that was merely a relinquishment in favour of the next successor and no new title was created by such gift: see Roy's Customary Law, page 44. The period necessary to constitute a custom as ancient existed in the present case. He cited Banerjee's Stridhan (4th Edition), page 244 Shama Charan Sarkar's Vyavastha Darpan page 117, *Soorendranath Roy* v. *Mussamut Heeramonee Burmoneah* (5),

(1) (1905) 2 C. L. J. 20 ; 29.
(2) (1886) I. L. R. 10 Bom. 598.
(3) (1870) 13 Moo. I. A. 542 ; 549.
(4) (1900) I. L. R. 23 All. 37 ; L. R. 27 I. A. 238.
(5) (1868) 12 Moo. I. A. 81, 91.

1918

AMBALIKA DASI v. APARNA DASI.

Shyamanand Das Mohapatra v. *Rama Kanta Das Mohapatra* (1), *Sarabjit Partap Bahadur Sahi* v. *Indarjit Partap Bahadur Sahi* (2).

Sir Rashbehary Ghose (with him *Babu Mahendra Nath Roy*, *Babu Hara Prasad Chatterjee*, *Babu Biraj Mohan Mazumdar* and *Babu Suresh Chandra Bose*), for the respondents, contended that the rule of succession set up by the defendants was based upon a grant and not upon a family usage or *kulachar*. The grant in so far as it laid down the line of succession was absolutely void and unknown to Hindu Law. The succession as laid down in the grant was to apply to unborn persons. Further that no question of immemorial usage could possibly arise in the present case when the origin of the supposed custom was unknown. No question of immemorial usage arose when according to the appellants themselves there had been only one instance of succession namely, that of Kripamoyi: see: *Prince Mahomed Buktyar Shah* v. *Rani Dhojamani* (3), *Bhau Nanaji Utpat* v. *Govind* (4), *Umrithnath Chowdhry* v. *Goureenath Chowdhry* (5). In Hindu Law custom must exist from time immemorial: see *Garuradhwaja Prasad Singh* v. *Superundhwaja Prasad Singh* (6), *Ramalakhshmi Ammal* v. *Sivanantha Perumal Sethurayar* (7). In *Garuradhwaja Prasad Singh* v. *Superundhwaja Prasad Singh* (6), there was nothing to show how and when the custom had its origin.

Sarabjit Partap Bahadur Sahi v. *Indarjit Partap Bahadur Sahi* (2), *Shyamanand Das Mohapatra* v.

(1) (1904) I. L. R. 32 Calc 6.
(2) (1904) I. L. R. 27 All. 203.
(3) (1905) 2 C. L. J. 20
(4) (1874) 11 Bom. H. C. Rep. 249.
(5) (1870) 13 Moo. I. A. 542, 549.
(6) (1900) I. L. R. 23 All. 37; L. R. 27 I. A. 238.
(7) (1872) 12 B. L. R. 396; 14 Moo. I. A. 570, 585.

Ramakinta Das Mohapatra (1), do not support the contentions of the appellants.

Dr. Jadunath Kanjilal, in reply.

Cur. adv. vult.

CHATTERJEA J. This appeal and appeal No. 59 arise out of a suit instituted by the plaintiffs as executors to the estate of one Kali Prasanna Ghose for the partition of a property called Taraf Katia Nangla and for allotment of a one-third share thereof to the plaintiffs.

Taraf Katia Nangla Touzi No. 1086 of the Khulna Collectorate consists of 8 mauzahs, one of which bears the name of Katia Nangla. It is situated in Pargana Sahas, and the revenue payable for it was included in the dowl of Pargana Sahas at the time of the decennial settlement, but has all along been treated as a separate property and a separate touzi number was given to it when the Cess Act came into force. The plaintiff claims title to one-third share of it in the following manner.

Pargana Sahas belonged to the Chanchra Raj family, and Raja Barada Kant (the last Raja) left three sons. Jnanada Kant, Hemada Kant and Manada Kant. Hemada Kant Roy, one of the sons, sold his undivided one-third share of Zemindari Mehal Pargana Sahas, Touzi No. 186 of the Khulna Collectorate to Kali Prasanna Ghose by a conveyance, dated the 15th December 1892, "together with a like share of and in all and singular subordinate interests in the said zemindari including the *Ranian britti* in Katia Nangla for Rs. 1,15,000. At that time the life estate in Taraf Katia Nangla was held by Rani Durga Sundari, the mother of Hemada Kant, under a family arrangement, the latter having a vested remainder in one-third share of the property. In the year 1901, Kali Prasanna Ghose brought a suit for partition of Pargana Sahas

(1) (1904) I. L. R. 32 Calc. 6.

1918

AMBALIKA DASI v. ARPANA DASI.

CHATTERJEA J.

including Mauza Katia Nangla. The case was amicably settled, and Pargana Sahas was partitioned; and it was agreed in that suit that Taraf Katia Nangla would remain in the possession of the Rani during her life time and that it would be partitioned after her death.

Rani Durga Sundari died on the 28th December 1911 and the present suit was instituted on the 7th August, 1912.

The plaint was originally one for partition with a court-fee of ten rupees and was directed only against the defendants Nos. 1 to 4 who are the representatives of the brothers of Hemada Kant. The defendants 1 to 4 disclaimed all interest in the property, and stated that Taraf Katia Nangla was the *Ranian britti* of the Ranis of the family. The defendants Nos. 6 to 9 (the Ranis) were thereupon added as parties. They pleaded that the Taraf was *Ranian britti*, that under a family custom the Ranis of the family successively are entitled to it, that the male members of the family have no right to the same, and that accordingly the plaintiff had acquired no title to it under the conveyance executed by Hemada Kant. The latter (the defendant No. 5) was also made a party and he pleaded that the claim set up by the defendants 6 to 9 that the property was held by Ranis in succession was false, that the property was obtained by his mother Rani Durga Sundari by gift from one Rani Kripamoyi (who held it in absolute right) and that on the death of Rani Durga Sundari, he as her sole surviving son was entitled to the whole of the Taraf, but that the plaintiff had not acquired any right to Katia Nangla under the conveyance executed by him in favour of Kali Prasanna Ghose. The plaint was thereupon amended and the suit was converted into a title suit.

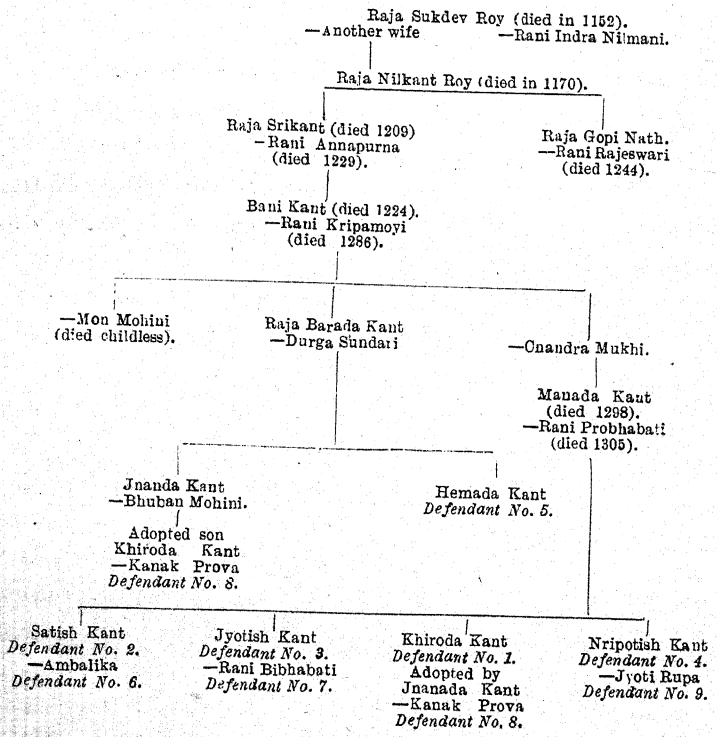
The Court below held that the defendants 6 to 9 had failed to prove the family custom set up by

them, that Hemada Kant had a vested interest to the extent of one-third in it, at the time of the sale of his share of Pargana Sahas, but that a third share in Mauza Katia Nangla only and not in the whole Taraf Katia Nangla, passed under the conveyance executed by him in favour of Kali Prasanna Ghose, and made a decree accordingly.

The defendants Nos. 6 to 9 have preferred Appeal No. 86 of 1915, and the plaintiffs have preferred Appeal No. 59 of 1915.

We will first deal with the appeal of the defendants Nos. 6 to 9, viz., Appeal No. 86 of 1915.

The following genealogical table of the family will be useful in following the facts of the case.



It is alleged by the defendants 6 to 9, that Raja Nilkant executed a sanad in favour of his step mother

1918

AMBALIKA DASI v. APARNA DASI.

CHATTERJEA J.

Rani Indra Nilmani on the 16th Sravan 1160 B. S. (1853). The original sanad is not forthcoming, but it is stated in a Rubokari of the Collector of Jessore, dated the 25th March 1816, that "on reference to the sanad and after an enquiry it became clear that Raja Nilkant had made a gift as *britti* of 5001 bighas in Mauza Katia Nangla and others" together with other lands in other Mauzas to Rani Indra Nilmani for her maintenance that she was in possession thereof, and that during her life time she made a gift of them to Rani Annapurna as a *joutuk britti*. The original sanad, therefore, must have been produced before the Collector. The defendants have produced in this case a confirmatory sanad said to have been granted by Raja Srikant Roy on the 4th February 1797 to his wife Rani Annapurna and his brother's wife Rani Rajeswari (wife of Raja Gopinath) in which it is stated "my father the late Raja Nilkant Roy gave Taraf Katia Nangla and others in Pargana Sahas to the late Rani Indra Nilmani as *Ranian joutuk britti* for the performance of *bratas* and other charitable and pious acts...Confirming the aforesaid Katia Nangla and others included within my zemindari Pargana Sahas is again granted to you as *joutuk britti* for your maintenance and the performance of pious acts. You and the Ranis of the family shall remain in the enjoyment and possession of the aforesaid *britti* and hold the same as *lakheraj*. You or the future Ranis shall not be entitled to make a sale gift or *hiba* of the aforesaid *britti* and shall be entitled only to enjoy the profits thereof. I or my heirs shall have no claim to or concern with the aforesaid *britti*. If I or they should at any time make any claim, it shall be futile and of no effect. To this effect I grant this sanad in confirmation of the *Ranian joutuk britti*."

The defendants have also produced a *taidad* of the *bajeh* lands belonging to Rani Annapurna filed in the Jessore Collectorate in 1209 B.S., by one Ramdin Singh in which it is stated that Raja Nil Kant had granted a *britti* to Rani Indra Nilmani of lands situated in Mauzah Katia Nangla and seven other mauzahs (named) and she made a gift of that *britti* as *joutuk* to Rani Annapurna. The date of the old sanad bearing the signature of the Raja is given as 11th Bhadra, 1160 B.S., and that of the *joutuk britti* as 25th Sravan, 1187.

It appears that the said Ramdin Singh obtained a mortgage of about 3,867 bighas of land situated in Katia Nangla (referred to in the proceedings as purchase) from Rani Annapurna. On the death of Ramdin, his son Mohan Singh was in possession of the property, and he made gift of portions of the same to his son-in-law and daughter's son who were in possession, when proceedings were started for resumption of the lands under Regulation XIX of 1793. The Collector of Jessore by his Rubokari dated the 25th March, 1816, referred to the sanad dated the 16th Sravan, 1160, and the facts stated above and came to the conclusion that the lands were actually the "*joutuk britti* properties" of Rani Annapurna, and that under the circumstances the Government had no title to the lands mentioned in the sanad.

Rani Annapurna (the widow of Raja Srikant) died in 1229, and it appears from a petition of her daughter-in-law Rani Kripamoyi (hereafter referred to) that she made a gift of the entire *britti* Taraf Katia Nangla during her life time to Rani Kripamoyi. Raja Srikant's son Banikant died in 1224, leaving his widow Rani Kripamoyi and a minor son Raja Barada Kant. Raja Barada Kant's estate having fallen into arrears of Government revenue was taken charge of by the Court of Wards.

1918

AMBALIKA DASI v. APARNA DASI.

CHATTERJEA J.

In the meantime the mortgage debt due to Mohan Singh (son of Ramdin Singh) was satisfied, and Mohan Singh, by a petition to the Collector of Jessore, dated the 18th December 1822, stated that he had received the whole of the principal and interest, and prayed that the name of Rani Kripamoyi as the owner of the *joutuk britti* might be entered by expunging his name.

Rani Kripamoyi on the 9th March 1823, applied to the Collector of Jessore for registration of her name in respect of *joutuk britti* Katia Nangla as the mortgage had been paid off, but stated that the property might remain under the management of the Court of Wards until the money due from her son (Raja Barada Kant) to Government was satisfied, when it would come back to her, and that an annual sum might be fixed for her personal expenses and religious rites, and this proposal was accepted and given effect to by the Collector as would appear from his Rubokari dated the 22nd March, 1863.

In 1823, the Government decided to restore Pargana Sahas to the minor Raja (Barada Kant) after a proper settlement shall have been made by the Collector and directed the Board of Revenue (by a letter dated the 13th November, 1823) to issue the necessary orders.

In the year 1837, one Ram Kissen Panda put in a *taidad* in the Collectorate in respect of 6,121 bighas of lands in Katia Nangla and other mauzahs claiming the same under a gift from Rani Indra Nilmani. The Collector thereupon started proceedings for assessment of revenue upon those lands under the provisions of Regulation II of 1819.

Rani Kripamoyi in her petition dated the 4th August, 1837, filed in the said proceedings stated that "since a long time before the British Government

the Ranis of Rajas have been in enjoyment and possession of the *Ranian britti* in many villages especially in Taraf Katia Nangla as revenue-free lands. The Ranis in former times had been in possession of the *britti* in lieu of maintenance of the Ranis, and they had been in the enjoyment of the profits. In this way after the death of one Rani another Rani succeeded to the rights of enjoyment for her maintenance. In this way the *brit* having come down from one Rani to another it descended to the late Rani Annapurna who made a gift of the entire *Brit* Taraf Katia Nangla and others to me as a *joutuk* for my maintenance and since then I have been holding that property as *joutuk* property and I have been in undisputed enjoyment of the profits thereof. Neither the aforesaid Panda nor any other person has a single cottah of *lakheraj* land in the aforesaid Taraf." Raja Barada Kant in his petition of the same date stated that "in the year 1197 when a decennial settlement of the entire zemindari was concluded with my grandfather the late Maharaja Sri Kant Roy the entire *Ranian britti* was resumed and being assessed with revenue included in the dowl of the zemindari. Thereupon the late Raja paid the revenue of the resumed *brits* along with the zemindari and maintained the grant (*brit*) to the Ranis Rajeswari and Annapurna as before for their maintenance. After their death my mother Srimati Rani Kripamoyi succeeded to the *brit* property who defrayed the expenses of her maintenance out of it, and I have been paying the revenue of the entire property to Government. But they have not the power of making a sale or gift of that *brit* . . . . when the *Ranian britti* was resumed by Government in the year 1197 and assessed with revenue, and when the Ranis have not the power of making a sale or gift how can it be possible that Rani Indra Nilmani

1918

AMBALIKA DASI v. APARNA DASI.

CHATTERJEA J.

made a valid rent-free gift of the aforesaid 6,121 bighas of land to the aforesaid Panda."

The matter came up before the Special Deputy Collector and he held by his order, dated the 16th January 1838, that the lands in dispute were in fact the resumed lands of the Ranis, they having been resumed by the Government and their rents added to the entire zemindari of the Raja at the time of the decennial settlement, that the lands had been given away for maintenance to Rani Kripamoyi, that the claim of Ramkissen Panda was false, and that the claim of the Government to resume the lands on the ground of the same being *lakheraj* was untenable. The order of the Special Deputy Collector was upheld by the Commissioner by his Rubokari, dated the 16th February, 1839.

Rani Kripamoyi lived for a long time and appears to have been in possession of Katia Nangla so long as she was alive.

In the abstract statement of the *jamabandi* of Pargana Sahas prepared by the Collector in 1232 (1826) apparently when the estate of the minor Raja was taken charge of by the Court of Wards, Katia Nangla was not included. The Rani, however, as we have seen, agreed that Katia Nangla should be in the possession of the Court of Wards so long as the debts of the minor Raja was not paid off. She asserted her right and possession before the Special Deputy Collector when Ramkissen Panda set up a claim based upon the alleged gift from Rani Indra Nilmani, and she was supported by her son Raja Barada Kant and her right was recognised by the Special Deputy Collector and the Commissioner in 1838. The *Jama Wasil Baki* papers (Ex. D Series) from 1279 to 1286, pattas granted by Rani Kripamoyi (Ex. A Series), Kabuliats (Ex. E Series), *Saltamami Nikash Jama Kharach* (Ex. C.), rent receipts (Ex. F Series), counterfoil rent receipts

(Ex. H. Series) and decrees; show Rani Kripamoyi as being in the possession of "*joutuk britti*" or "*Ranian britti*" Katia Nangla.

There is one instance however which shows that Raja Barada Kant asserted his rights to a portion of Taraf Katia Nangla. It appears that one Dwarka Nath Bose claimed 45 bighas of land as included within his Mehal Gandamara in certain proceedings before the Deputy Collector in the year 1857 and Raja Barada Kant claimed it and asserted his possession to it as being included in Mauzah Sukdara (one of the mauzahs of Taraf Katia Nangla) within his "zemindari Pargana Sahas".

He lost the case, and it does not appear that Rani Kripamoyi was any party to the proceedings.

Rani Kripamoyi made a gift of Katia Nangla to Rani Durga Sundari and the latter was in possession of the Taraf so long as she lived. There are a large number of documents showing her possession and the fact of her possession is not disputed.

After the death of Raja Barada Kant, disputes arose between Manada Kant (the son of his second wife) and Jnanada Kant and Hemada Kant his sons by his wife Rani Durga Sundari. Rani Durga Sundari claimed Taraf Katia Nangla and certain other properties as her *Ranian britti*. The dispute was settled by a release dated the 17th February, 1884, executed by her in favour of Manada Kant whereby she gave up her claim to the properties other than Taraf Katia Nangla claimed by her. It was agreed that the three brothers would get the whole estate with the exception of Taraf Katia Nangla in equal shares, that Taraf Katia Nangla would remain with their consent in the possession and enjoyment of Rani Durga Sundari for her maintenance for life and for the performance of religious duties, and that the sons would not

1918

AMBALIKA DASI v. APARNA DASI.

CHATTERJEA J.

be able to claim Katia Nangla during her life time.

Subsequently Hemada Kant sold his one-third share of Pargana Sahas "including the *Ranian britti* in Katia Nangla" by a conveyance, dated the 15th December 1892, as stated above to Kali Prasanna Ghose. On the 21st January 1901, Kali Prasanna Ghose instituted a suit for partition of Pargana Sahas, in which he prayed that "Mauzah Katia Nangla" may also be partitioned but to be held by Rani Durga Sundari during her life under the agreement. Rani Durga Sundari and the representatives of Jnanada Kant and Manada Kant were parties defendants to that suit. The suit was amicably settled and Rani Durga Sundari filed a petition of compromise in which she stated that "Taraf Katia Nangla" which was in her enjoyment and possession under the deed of release, dated the 17th February, 1884, would remain in her possession and enjoyment for her life. On the 9th March 1905, a decree was passed by consent for partition of Tauzi No. 186 (Pargana Sahas) and it was ordered that Taraf Katia Nangla included in Pargana Sahas "at present held by Rani Durga Sundari in life interest being now not fit to be partitioned, be kept undivided, and the same be partitioned after her death."

Rani Durga Sundari died on 28th December 1911, and since her death the Ranis of the family, viz., the defendants 6 to 9 claim to be in possession of Taraf Katia Nangla. Their possession is not seriously disputed. The second issue in the case was "Are the Ranis mentioned in the written statement in possession of the whole or any part of the property?" and the learned Subordinate Judge says in his judgment that it (along with some others) had not been pressed.

The original sanad of 1160 (1753) as already stated is not forthcoming, but having regard to the fact

that it was produced before the revenue authorities a century ago (in 1816) [see Rubokar of Collector of Jessore, dated 25th March, 1816, Ex. I (3)], there can be no doubt that there was such a sanad. The terms of the sanad, however, are not set out in the Rubokar, and all that appears is that there was a gift of 5,001 bighas of land in Katia Nangla by Raja Nilkant to his stepmother Rani Indra Nilmani for her maintenance.

The next grant set up by the defendants, as stated above, is that of Raja Srikant Roy, dated the 4th February 1797 (Ex. Mi), in favour of his wife Rani Annapurna and his brother's wife Rani Rajeswari. The learned Subordinate Judge was of opinion that this document was genuine. It is said that this document was in the record room of the defendants, and was accidentally found in 1317. The evidence on the point was not believed by the Court below, and we do not think that the evidence is convincing. The grant, however, is referred to in Exhibit O which is said to have been found along with it. This Ex. O is a register of documents "appertaining to *Rani in britti* Mehal Tar. af Katia Nangla and others belonging to Rajmata Rani Kripamoyi" purporting to have been prepared in the year 1284 B S. It mentions (among various other documents) a "sanad confirming *Ranian joutuk britti*, dated the 25th Magh, 1203 B.S., granted by Raja Srikant Roy to Rani Annapurna and Rani Rajeswari." The *taidad* (Ex. N) and the Exhibit O, do not appear to have been challenged in the Court below, and the learned Subordinate Judge has not referred to Ex. O at all in his judgment. So far back as the 4th August, 1837, Raja Barada Kant, in his petition to the Special Deputy Collector, stated that the late Raja . . . . . "maintained the grant (*britti*) to the Ranis Rajeswari and Annapurna as before for their maintenance." The sanad of 1203 does not appear to have been produced

1918

AMBALIKA DASI v. APARNA DASI.

CHATTERJEA J.

before the authorities at that time. It may be (as suggested on behalf of the defendants) that as Raja Barada Kant and Rani Kripamoyi were resisting the claim of Ram Kissen Panda based upon an alleged gift by Rani Indra Nilmani (who had got Taraf Katia Nangla under the sanad of 1160 from Raja Nilkant) the confirmatory sanad of 1203 was not of importance in these proceedings.

The learned Subordinate Judge was of opinion that the sanad of 1203 is inconsistent with other subsequent unimpeachable evidence. The *taidad* of 1209 states that there was at first a gift of Taraf Katia Nangla to Rani Indra Nilmani, and then that property was given to Rani Annapurna in 1187, whereas the sanad of 1203 shows that the property was given to the two Ranis Annapurna and Rajeswari. The Collector's proceedings of 1816 also show the same thing. Then again Rani Annapurna alone mortgaged the property to Ramdin Singh, and the petition of Mohan Singh also shows that Rani Annapurna alone was the owner. Rani Kripamoyi also in her petition of 1229 set up the previous title of Annapurna alone, Rani Rajeswari did not object to the transfer of Katia Nangla by Annapurna to Ramdin, nor does she appear to have dealt with the property in any way although she did not die until 1244. On the other hand Rani Rajeswari was dealing with certain other properties without any reference to Rani Annapurna. An explanation was attempted on behalf of the Rani defendants based upon the fact that there were other properties besides Taraf Katia, which was given as *Ranian britti* to Rani Annapurna and Rani Rajeswari, and it was suggested that by some arrangement between themselves Rani Annapurna obtained Taraf Katia Nangla, and Rani Rajeswari got other properties, and that this would explain why the Ranis were dealing with

certain properties without reference to each other. The sanad of 1203 no doubt refers to the grant of Taraf Katia Nangla "and others" to Rani Indra Nilmani. and confirms the grant to the two Ranis but "the others" are also stated to be in Pargana Sahas. The properties dealt with by Rani Rajeswari do not appear to be situate in Pargana Sahas. That being so, the explanation is not satisfactory. Though the fact that Rani Rajeswari had some properties which she was dealing with, as her *britti* without reference to Rani Annapurna may suggest the possibility of other grants to the two Ranis, and an agreement between them there is no evidence to show that there was any other grant to the two Ranis. We need not however discuss the matter further, because in our opinion the genuineness of the sanad of 1203 does not help the case of the Rani defendants. The learned Subordinate Judge was of opinion that "if this document (sanad of 1203) be a genuine one, then the contention of the Ranis is true." But the sanad states "you and the Ranis of the family shall remain in the enjoyment and possession of the aforesaid *britti* and hold the same as *lakheraj*, you or the future Ranis shall not be entitled to make a sale, gift or *hiba* of the aforesaid britti and shall be entitled only to enjoy the profits thereof." Now in so far as it lays down a rule of succession limited to the Ranis of the family, it is not valid. An agreement such as that laid down in the sanad cannot alter the line of succession according to law. Its value as evidence of the family usage will be considered later on, and this brings us to the main question in the case, viz., whether any family custom or usage has been proved under which the Ranis are entitled to succeed to the *Ranian britti* property Katia Nangla to the exclusion of persons who are entitled to succeed according to law. As already stated Rani Indra

1918

AMBALIKA DASI v. APARNA DASI.

CHATTERJEA J.

Nilmani first obtained the property under sanad of 1160. She made a gift of it as *joutuk britti* to Rani Annapurna during her life-time. This is clear from the Rubokari, dated the 25th March, 1816; and the Rubokari of the Collector, dated the 22nd March 1823, states that Rani Annapurna filed a hebanama in respect of Taraf Katia Nangla. Then again, it appears from the petition of Rani Kripamoyi, dated the 4th August 1837, that Rani Annapurna also made a gift of the Taraf to Rani Kripamoyi as *joutuk britti*. It is contended on behalf of the Ranis that the conveyance by one Rani in favour of another during her life-time merely accelerated the succession and reliance is placed upon the statement of Rani Kripamoyi in her petition dated the 4th August 1837, that "after the death of one Rani another Rani succeeded to the right of enjoyment for her maintenance." But as the *kula-char* is based upon these instances, we cannot ignore the fact that there were conveyances by one Rani in favour of another. The right of Rani Durga Sundari to the property was disputed by her step-son Manada Kant after the death of Raja Barada Kant, and the dispute was settled by the release executed by her under which she was to enjoy the property only for her life.

It is to be observed that Rani Annapurna claimed the properties as her *joutuk britti* obtained by gift from Rani Indra Nilmani. She mortgaged Katia Nangla to Ramdin Singh and Rani Kripamoyi treated the mortgage as valid. Had there been a family custom that each Rani was to hold only a life estate, Rani Kripamoyi would have been entitled to succeed to the property on the death of Rani Annapurna without redeeming the mortgage. It is contended on behalf of the Rani defendants that Rani Annapurna died in 1229 and Kripamoyi got the property in the same year,

and that the mortgage money had been satisfied by the time Annapurna died, out of the profits of the property, and it was therefore unnecessary on the part of the Rani Kripamoyi to embark on a litigation to show that Rani Kripamoyi had no right to mortgage the property. It appears however from the petition of Mohan Singh (the son of the Mortgagee Ramdin Singh), dated the 18th December 1822, that after the death of Rani Annapurna, the balance of the money due under the mortgage was received by him, and Kripamoyi in her petition dated the 9th March 1823, stated that the mortgage was redeemed by the Government. Rani Rajeswari also was dealing with her *Ranian* properties without reference to Rani Kripamoyi. By a *kabala* dated 26th January 1810 (Exhibit 1), Rani Rajeswari transferred certain mauzahs out of Taraf Madhukhali by way of conditional sale for Rs. 10,501 in favour of Gauri Charan Ghose and others, and from a rubokar of the Collectorate, dated January 1828, it appears that she applied to the Collector to pay off the mortgage on behalf of the minor Raja (whose estate was then under the Court of Wards) "as there will be no heir to the said *milkiat* except the said minor." Then it appears that with regard to another *brit* property of Rani Rajeswari, which consisted of Taufir lands Raja Barada Kant on the 26th May, 1911, claimed that he was entitled to it on her death, and prayed for settlement of the same with him. It is clear therefore that so far as Rajeswari's *brit* properties were concerned they came to be inherited by Raja Barada Kant and not by any Ranis of the family as laid down in the sanad of 1203.

It is contended that the fact that the Ranis purported to transfer does not show that they had the power to do so, and that Hindu widows often make alienations in excess of their powers. But in deciding the

1918

AMBALIKA DASI v. APARNA DASI.

CHATTERJEA J.

question of family usage the fact that the Ranis have dealt with the properties as if they were owners thereof, cannot be excluded from consideration.

It is contended on behalf of the plaintiff that the rule of succession set up is based upon a grant and not upon a *kulachar* or family usage. The defendant Jyotish Kant in the 19th paragraph of his written statement stated that Taraf Katia Nangla constitutes the "*Ranian britti* treated by a valid grant." Further on he says that the properties have all along been held uninterruptedly by the respective Ranis "as of right" and according "to the long established family usage" and "custom of the country prevalent among specially respectable families." So that it was based upon grant, *kulachar* and also *deshachar*. In the written statement of the Rani defendants they set up the original grant of 1160 to Rani Indra Nilmani, and the confirmation of the grant in 1203 by Raja Srikant, and also set up the long-standing and uninterrupted usage and family custom in the Raj family, "as being held by the Ranis in succession, each Rani having only a life interest without having any right to make any sort and gifts, etc."

As observed above the grant in so far as it lays down a rule of succession is absolutely void, as it prescribes a right of succession unknown to Hindu law. It is also void as it purports to create successive life estates in favour of unborn persons, the estate itself being undisposed of. Even if the rule of sucession laid down in the sanad of 1203 has actually been followed, it cannot be treated as binding upon the family unless it has ripened into a family custom.

It is contended on behalf of the Ranis that ever since 1160 B.S. for more than a century and a half, the Ranis of the family have been successively in possession of the property as *Ranian britti*; and

there is no evidence to show that any Raja was in possession of it.

But in order to establish a custom it must be shown that the custom has existed from time immemorial and where the custom set up is peculiar only to a single family, the rule is more strictly enforced than ever. It is true that a family custom of proved antiquity is entitled to be recognised by the Courts, irrespective of the position and rank of the family, and the Chanchra Raj family appears from Hunter's Statistical Account of Jessore to be an ancient family of position and importance.

It is contended on behalf of the plaintiffs that no question of immemorial usage can possibly arise when the origin of the alleged usage is known. In the present case the custom is said to have originated with the grant in 1160. Assuming that there can be a valid custom where the origin is known, it must be shown that there has been a long line of succession in accordance with the usage. In *Sumrun Singh* v. *Khedun Singh* (1), the Sudder Dewanny Adalut after taking the opinion of Pandits, held that in order to legalize any deviation from the strict letter of the law, it is necessary that the usage should have been prevalent during a long succession of ancestors in the family when it becomes known by the name of *kulachar*, and in that case only two instances having been adduced in support of the *kulachar* set up in that case, the Court held that it was not sufficient: *see* also *Pertab Deb* v. *Surrup Deb Raikut* (2). In the case of *Ramalakhshmi* v. *Sivananantha* (3) their Lordships of the Judicial Committee observed: "Their Lordships are fully sensible of the importance and justice of giving effect to long-

(1) (1814) 2 Sel. Rep. S. D. A. 116.
(2) (1818) 2 Sel. Rep. S. D. A. 249.
(3) (1872) 12 B. L. R. 396; 14 Moo. I. A. 570.

1918

AMBALIKA DASI v. APARNA DASI.

CHATTERJEA J.

established usages existing in particular districts and families, but it is of the essence of special usages modifying the ordinary law of succession that they should be ancient and invariable, and should be established to be so by clear and unambiguous evidence; for it is only by means of such evidence that the Courts can be assured of their existence and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends." It is contended on behalf of the defendants that in this country a custom would be valid if in existence from before the year 1793, and reliance is placed upon the observations of Sir Charles Grey C.J. in an early case referred to in Banerjee's Stridhan, page 234, and it is pointed out that in the case of *Garuradhwaja* v. *Superundhwaja* (1) the existence of a family custom for 80 years was held to be sufficient. Although there may be no definite rule in Hindu law as to how old a custom must be in order that it may have the force of law, in the present case (as will be presently shown) there does not appear to have been *succession* according to any famliy usage from before the year 1793.

In the case of *Garuradhwaja* v. *Superundhwaja* (1), there was evidence of a family custom (succession by primogeniture) for 80 years, and the family belonged to a group of families in which the custom had been in existence from time immemorial, and it was held under the circumstances that the family custom had been proved.

The only case in which a family custom of succession from mother-in-law to daughter-in-law was set up, was in the case of *Prince Mahomed Buktyar Shah* v. *Rani Dhojamani* (2) and it was held not to be proved.

(1) (1900) I. L. R. 23 All. 37; L. R. 27 I. A. 238.

(2) (1905) 2 C. L. J. 20.

In the present case Rani Indra Nilmani obtained the property under an express grant. Ranis Annapurna and Rajeswari also had a sanad (though a confirmatory sanad) assuming the same to be genuine, and there was a gift by Rani Indra Nilmani during her life-time to Rani Annapurna. The sanad of 1203 does not refer to any family custom. It merely recites the grant of Taraf Katia Nangla and others in Pargana Sahas as *Ranian joutuk britti* to Rani Indra Nilmani, and states that the Taraf Katia Nangla and others is *again granted* to Ranis Rajeswari and Annapurna as *joutuk britti*, and lays down the line of succession as to future Ranis. No question can, therefore, arise of any family custom up to the time when Rani Annapurna got the property. Rani Annapurna admittedly made a gift of the property to Rani Kripamoyi during her life-time, and it was during the time of Rani Kripamoyi when Ramkissen Panda claimed the property under an alleged gift from Rani Indra Nilmani, that the custom was set up for the first time. It is said that it was the first occasion on which it was necessary to set it up. But had there been a family custom as described in the petition of Rani Kripamoyi, dated the 4th August, 1837, viz., that since a long time before the British Government the Ranis of the family had been in enjoyment and possession of *Ranian britti* and that after the death of one Rani another succeeded to the rights, it would have been mentioned in the sanad of 1203, granted by Raja Srikant. In the proceedings which took place in 1837, Rani Kripamoyi after reciting the custom as stated above, said that the property descended to Rani Annapurna who made a gift of it to her as a *joutuk* and since then she had been holding that property as *joutuk* property. Raja Barada Kant by his petition

1918

AMBALIKA DASI v. APARNA DASI.

CHATTERJEA J.

of the same date stated that his mother *succeeded* to the *britti* property. The suggestion is that the gift by one Rani during her life time to another merely accelerated the succession. But the custom set up in the petition of Rani Annapurna was that "after the death of one Rani another succeeded to the rights." Without attaching, however, any importance to these distinctions, the only instance of succession which can possibly be relied upon on behalf of the defendants is that of Rani Kripamoyi. Leaving aside the fact that there was a gift to her by Rani Annapurna during her life-time, can it be said that Rani Kripamoyi succeeded under any family custom? There was no case of succession according to family custom before she succeeded, and there could not be any family custom between the date of grant to Rani Annapurna in 1203, and the succession of Rani Kripamoyi. In any case one instance of succession cannot establish a family usage. We have not referred to the oral evidence because it is not of any value, and in any case does not prove anything more than what appears from the documentary evidence.

After the death of Raja Barada Kant, Rani Durga Sundari's right to the *Ranian britti* was challenged by her step-son, Manada Kant, and the dispute was settled between her and the sons, by giving to Rani Durga Sundari only an estate for life, and in the suit for partition brought by Kali Prasanna Ghose, it was expressly agreed upon by Rani Durga Sundari, and the representatives of Jnanada and Manada, that Taraf Katia Nangla would be partitioned after her death. It is true that Rani defendants were no parties to these suits. But the husbands (of some of the defendants) who in the present suit say that the ladies of the family succeed to the *Ranian britti* under a family usage, were parties, and Bhuban Mohini the widow of

Jnanada Kant was also a party to the partition suit. Bhuban Mohini would have been entitled to succeed under the alleged custom on the death of Rani Durga Sundari, but she, along with the husbands of some of the present Rani defendants, agreed to the arrangement. A decree was passed by consent and the property was dealt with in a manner which is inconsistent with the existence of the family usage set up.

It is to be observed that no definite rule of succession is prescribed by the *kulachar*. The Ranis of the family are to succeed according to the *kulachar*, but whether the daughters-in-law alone or grand daughters-in-law also are to succeed, is not clear. In the present case the Rani defendants are all grand daughters-in-law of Rani Durga Sundari. Then again it is not stated what would happen, if a Raja becomes a widower and there is no dowager Rani, or daughter-in-law or grand daughter-in-law and the Raja subsequently marries a second time. On the whole, we are of opinion that the special family usage set up by the defendants has not been established, and the appeal must, therefore, be dismissed with costs.

WALMSLEY J. I agree.

Appeal dismissed.

L. R.

ORIGINAL CIVIL.

Before Greaves J.

1918

Feb. 25.

HARIBHUSAN DATTA

v.

MANMATHA NATH DATTA.*

Parties—Right to sue—Cause of action, survival of—Abatement of suit—Letters of Administration, application by residuary legatee for grant of—Death of residuary legatee—Substitution of heir of residuary legatee—Contentious matter—Civil Procedure Code (Act V of 1908), O. XXII.

The right to a grant of administration is a personal right derived from the Court.

If on the death of the testatrix, the residuary legatee under her will had obtained a grant of administration to her estate with a copy of the will annexed, his title would have been derived from the Court and would not devolve on his heir. The heir of the residuary legatee may be the proper person to obtain a grant of administration with a copy of the will annexed, but this is not by virtue of any right to administration which he inherited from the residuary legatee, but by virtue of the fact that as heir of the residuary legatee, he is the person most interested in the estate of the testatrix.

Sarat Chandra Banerjee v. *Nani Mohan Banerjee* (1) referred to.

APPLICATION on behalf of Haribhusan Datta.

On the 19th May, 1914, one Sreemutty Nrityamoni Dassee died after having executed her last will and testament on the same date. As there was no executor appointed to the will, Hem Bhusan Datta, the residuary legatee, applied to the High Court on the 23rd June, 1914, for grant of letters of administration with copy of will annexed of the deceased. Thereafter,

*Application in Original Civil Testamentary Suit No. 7 of 1914.

(1) (1909) I. L. R. 36 Calc. 799.

Manmatha Nath Datta and others entered caveats and on the 4th December, 1914, by an order of Court the matter was set down as a contentious cause. It was further ordered that the petition of Hem Bhusan Datta be treated as the plaint, and the affidavit of one Phani Bhusan Datta, which had been affirmed on the 5th August, 1914, be deemed as the written statement of the said caveators in Testamentary Suit No. 7 of 1914. On the 8th August, 1917, Hem Bhusan Datta died leaving him surviving his son, Haribhusan Datta, as his sole surviving heir. On the 21st February, 1918, Haribhusan Datta applied to the High Court for an order, *inter alia*, that the fact of the death of his father, Hem Bhusan Datta, be recorded, that he be substituted as plaintiff in Testamentary Suit No. 7 of 1914 in the place and stead of his father, that the cause title of the said suit be amended accordingly, that the suit be proceeded with and that letters of administration with copy of will annexed of Sreemutty Nrityamoni Dassee be granted to him.

Mr. A. C. Ghose (attorney for the applicant) submitted that this was a contentious cause and the provisions of O. XXII of the Civil Procedure Code, 1908, were applicable to it. The cause of action, therefore, survived to the applicant as heir and he was entitled to be substituted as plaintiff in the place of his deceased father and to be granted letters of administration with copy of will annexed of the testatrix. He relied on *Sarat Chandra Banerjee* v. *Nani Mohan Banerjee* (1), *Sham Chand Giri* v. *Bhayaram Panday* (2), *Janardhan Krishna Padhye* v. *Ramchandra Vithal Ranade* (3) and *Chotalal Chunilal* v. *Bai Kahubai* (4).

(1) (1909) I. L. R. 36 Calc. 799.
(2) (1894) I. L. R. 22 Calc. 92.
(3) (1901) I. L. R. 26 Bom. 317.
(4) (1897) I. L. R. 22 Bom. 261.

1918

HARI-BHUSAN DATTA v. MANMATHA NATH DATTA.

Sir B. C. Mitter (with him *Mr. B. K. Ghosh*), for the caveators, contended that the right to the grant of letters of administration was a personal right and did not survive to the heir of the residuary legatee of the testatrix. He relied on a passage in *Ramani Debi* v. *Kumud Bandhu Mookerjee* (1) at p. 926. The cases relied on by the applicant, with the exception of *Sarat Chandra Banerjee* v. *Nani Mohan Banerjee* (2), which, if anything, was in favour of the caveators' contention, had no bearing on the present case.

Mr. A. C. Ghose, in reply.

Cur. adv. vult.

GREAVES J. This is an application by Haribhusan Datta for an order that the fact of the death of his father Hem Bhusan Datta be recorded, that the cause title of the suit should be amended by substituting his name in place of that of his deceased father, and that other consequential amendments should be made in the petition whereby these proceedings were originated, and that thereupon the suit should be proceeded with and letters of administration with copy of the will annexed of Sreemutty Nrityamoni Dassee should be granted to the applicant.

Sreemutty Nrityamoni Dassee died on the 19th May, 1914. Hem Bhusan Datta on the 23rd June, 1914, petitioned this Court for a grant of administration with a copy of the will annexed to the estate of Nrityamoni, dated the 19th May, 1914. I have not before me a copy of the will or of the petition, but I understand that no executors were named in the will and that Hem Bhusan Datta was the residuary legatee. A caveat or caveats were entered by the defendants and, on the 4th December, 1914, it was ordered that the matter should be set down as a contentious cause.

(1) (1910) 14 C. W. N. 924. (2) (1909) I. L. R. 36 Calc. 799.

On the 8th August, 1917, Hem Bhusan Datta died leaving the applicant as his son, heir and legal representative. By virtue of section 197 of the Succession Act the applicant is now the person primarily entitled to a grant if the will is established.

It is urged on behalf of the applicant that now that the matter is a contentious cause, it is governed by the Code of Civil Procedure and that, under the provisions of Order XXII, he is entitled to be substituted as plaintiff as the right to sue survives. The sole question that arises on this application is whether any right to sue has survived to the applicant. I do not think that it has. The right to a grant of administration is a personal right, and although the applicant, if the will is established, may be the proper person to obtain a grant, this would be so not by virtue of any right to administration, which he inherits from his father, but by virtue of the fact that as heir of his father to the residue he is the person most interested in the estate. The reasoning of Mr. Justice Harington in *Sarat Chandra Banerjee* v. *Nani Mohan Banerjee* (1), seems to me to be equally applicable to the present application: in that case the executor named in the will of which probate was sought died before obtaining a grant, his widow sought to be substituted for him in the suit as being his heiress, and Mr. Justice Harington held that as the executor's right was derived under the will, the right did not survive to his widow: in the present case the right which Hem Bhusan sought was a right from the Court and if he had obtained a grant his title would have been derived from the Court and cannot, I think, devolve on his heir.

The result is, that the application fails and must be dismissed with costs. There is nothing to prevent

(1) (1909) I. L. R. 36 Calc. 799.

1918

HARI-BHUSAN DATTA v. MANMATHA NATH DATTA.

the applicant, if he is so minded, from applying for a grant, and if he does so, it is open for him to apply to adopt such material proceedings as have been taken in the present suit.

O. M

Application dismissed.

Attorney for the appellant: *A. C. Ghose.*
Attorney for the caveators: *N. C. Bose.*

APPELLATE CIVIL.

Before Richardson and Beachcroft JJ.

1918

Jan. 30.

LAKSHMI NARAYAN ROY

v.

SECRETARY OF STATE FOR INDIA.*

Peshkosh—Abwab—Antiquity and purpose of payment—Contractual foundation—Bengal Tenancy Act (VIII of 1885), ss. 74; 30(c)—Public Demands Recovery Act (Beng. I of 1895).

Where the Collector in execution of a certificate issued under the Public Demands Recovery Act, realised from the plaintiffs certain charges described as *peshkosh* levied on two estates from time immemorial, and the plaintiff sued for a declaration that it was illegal and prayed for the cancellation of the certificate for the refund of the amount thereunder, and for a perpetual injunction restraining the defendant from levying the *peshkosh* in future :—

Held, that *peshkosh* could not be regarded as an imposition in the nature of an *abwab* within the meaning of the various provisions enacted on that subject. Such payment came out of the land and the right thereto was an interest in the land to which a title might be made by prescription.

* Appeal from Appellate Decree, No. 2465 of 1915, against the decree of G. B. Mumford, District Judge of Midnapore, dated June 4, 1915, confirming the decree of Nalini Kanta Bose, Munsif of Contai, dated Aug. 26, 1914.

Held, also, that the peculiar situation and character of the land and antiquity and purpose of the payment all pointed to a legitimate contractual foundation.

Udoy Narain Jana v. *The Secretary of State for India in Council* (1) referred to.

SECOND APPEAL by Lakshmi Narayan Roy and others, the plaintiffs.

The present suit out of which this appeal arose related to a charge described as *peskhosh* levied by the Collector on two temporarily-settled estates known as Jalamutha and Majnamutha in the district of Midnapore, and realised from the plaintiffs by virtue of a certificate under the Public Demands Recovery Act. These estates were liable to inundation and village embankments were maintained to protect the cultivable lands. On the 4th December 1913, the plaintiffs instituted this suit against the Secretary of State for a declaration that the levy of *peshkosh* was illegal, and prayed for the cancellation of the certificate, for the refund of the amount levied thereunder and for a perpetual injunction restraining the levying of *peshkosh* in future. The defendant contended that *peshkosh* was a fixed annual sum payable as a contribution towards the large expense incurred annually by the proprietors in repairing the embankments. The estates being under direct management, that expense was now met by the Government. On the 26th August 1914, the Court of first instance dismissed the suit and found as a fact that the practice of levying and paying *peshkosh* had existed from a very long time. On appeal the lower Appellate Court, on the 4th June 1915, dismissed the appeal holding that there must have been at some time an agreement between the proprietor of the two estates and those who held lands therein, that the former should maintain and repair

(1) (1915) S A. No 44 of 1912 (unreported).

1918

LAKSHMI NARAYAN ROY v. SECRETARY OF STATE FOR INDIA.

the embankments in the estates with the aid of the funds contributed by the latter.

From that decision the plaintiffs preferred this appeal to the High Court.

Babu Jyotish Chandra Hazra, for the appellants, contended that anything realised over and above the rent was *abwab* and not recoverable: see s. 10 of Act X of 1859. Even if it were revenue, *peshkosh* was illegal. It was once realised by virtue of a certificate in 1912, and apart from that there was no evidence of any subsequent realisation. Even if *peshkosh* were paid down to 1844, the subsequent statutory enactments would make it illegal, and realisation for any number of years would not make it valid: see s. 3 of Regulation V of 1793 and ss. 54, 55 of Regulation VIII of 1793. If it were revenue, the Bengal Tenancy Act would apply: see s. 74 of the Bengal Tenancy Act. If it were a public demand, it would be realisable, but it was not so; it did not come under any of the items in the Schedule of the Act.

The Senior Government Pleader (Babu Ram Charan Mitter), for the respondent, contended as to what was the position of a *nisphidar* as tenant. He was not a tenant; he held an estate. The question of *abwab* would not arise if he held an estate. Moreover, Government constructed the embankment and levied *peshkosh*. It was a cess in addition to rent. It could not be said to be an *abwab*, and the basis of the claim was long continued, payment being from time immemorial.

Babu Jyotish Chandra Hazra, in reply.

RICHARDSON AND BEACHCROFT JJ. This appeal is preferred by the plaintiffs in a suit against the Secretary of State, and relates to a charge described as

peshkosh which the Collector has levied from the plaintiffs in execution of a certificate issued under the Public Demands Recovery Act (Bengal Act I of 1895). The plaintiffs sue for a declaration that the levy of *peshkosh* is illegal, and they further pray for the cancellation of the certificate, for the refund of the amount levied thereunder, and for a perpetual injunction restraining the Secretary of State from levying *peshkosh* in future.

It appears that there are two estates, known as Jalamutha and Majnamutha, in the district of Midnapore, the history of which is adverted to in the judgments of the Courts below. At the time of the Permanent Settlement the proprietors refused to accept the settlements offered to them, and the estates have ever since been temporarily settled. Their situation renders them liable to inundation and *grambheries* or village embankments are maintained to protect the cultivable lands. It is asserted for the Secretary of State that *peshkosh* is a fixed annual sum payable by the *nisphidars* (holders of resumed lakhiraj lands) and *lakhirajdars* of these estates, as a contribution towards the not inconsiderable expense, which has to be incurred every year by the proprietors for the time being, in repairing the embankments. As the estates are at the present time under direct management, that expense is now met by the Government.

Both the Courts below have found as a fact, that the practice of levying and paying *peshkosh* has existed from a very long time. The learned Munsif in the trial Court says that the proprietors from time out of memory have been realising *peshkosh* from *lakhirajdars* and *nisphidars* and in some cases from the tenants of *lakhirajdars* and *nisphidars*. The learned District Judge in the lower Appellate Court says similarly "There can be no doubt from the oral and

1918

LAKSHMI NARAYAN ROY v. SECRETARY OF STATE FOR INDIA.

documentary evidence adduced for the defendant, that *peshkosh*, although its actual origin is unknown, was being realized by the proprietors of the two estates from *lakhirajdars* (whether their title was valid or not) and from *mal* tenants from 1207 (1800 A.D.) and that it was taken as a contribution by the aid of which the proprietors were to repair the village embankments within the estate." The inference which the District Judge has drawn from the evidence is, that the practice has existed for so long, that it must be referred to some legal origin, and he holds that there must at some time have been an agreement between the proprietors of the two estates and those who hold land therein, that the former should maintain and repair the *grambheries* in the estates with the aid of funds contributed by the latter. He refers to Mr. Bayley's Report on the settlement of Majnamutha in 1844 as authority for the statement that prior to that year, probably in 1827, in the case of *mal* tenants or tenants of rent paying lands, *peshkosh* was amalgamated with rent. In the case of the *lakhirajdars* no such amalgamation could take place and when some of the *lakhiraj* lands were afterwards resumed, the *nisphidars* continued to pay under a separate head and apart from their rent, the sum which they had previously paid on this account as *lakhhirajdars*.

The annual payment for which the plaintiffs have been found liable was fixed in 1844 or before, at Rs. 13-1-8 gds.

The main contention of the learned pleader for the plaintiffs is that *peshkosh* is an *abwab* and as such is prohibited by the tenancy law in this country. If that contention has any substance, it is somewhat surprising that the fact was not discovered before this. The collection of *abwabs* has now been prohibited for a great number of years. So far as we are aware the

objection taken on this ground has only once been taken before and then unsuccessfully, in a case to which I shall shortly refer. We are satisfied that *peshkosh* cannot be regarded as an imposition in the nature of an *abwab* within the meaning of the various provisions which have been enacted from time to time on that subject. The plaintiffs own *kabulyat* of 1844 shows, that the amount due on account of *peshkosh* was deducted from the assets of the land and that rent was assessed only on the balance of the assets, after this deduction had been made. That indicates that the payment comes out of the land and that the right to it is an interest in the land to which a title may be made by prescription.

The peculiar situation and character of the land and the antiquity and purpose of the payment, all point to its having a legitimate contractual foundation. If the statutory law governing the relations of landlord and tenant must be applied, the modern analogue is to be found not in section 74 of the Bengal Tenancy Act relating to illegal cesses, but rather in the provisions of that Act relating to improvements [Chapter IX and section 30 (*c*)].

We are supported in the view we take, by an unreported decision of Sir Lawrence Jenkins C. J. and Holmwood J. (Second Appeal No. 44 of 1912, decided 30th July 1915.) Sir Lawrence Jenkins, referring to a claim for *peshkosh* in the Majnamutha estate, said that the basis of the claim was long continued payment beyond the memory of man which was in itself a title in favour of the recipient of the payment. He referred to *Sumbhoo Lal* v. *Collector of Surat* (1), where the payment in question might have had a vicious origin, and added, that there was no vice in the origin of

(1) (1859) 8 Moo. I. A. 1, 40.

1918

LAKSHMI NARAYAN ROY v. SECRETARY OF STATE FOR INDIA.

peshkosh, the consideration for which on the contrary was most beneficent work.

It was suggested in the argument that in the case of the plaintiffs it has not been shown that they have regularly paid *peshkosh*. It is in evidence, however, that *peshkosh* was levied from them under the certificate procedure in the year 1904, and *peshkosh* is mentioned in their *kabuliyat* of 1844. We are satisfied that there are materials on the record upon which the Court below was entitled to come to the conclusion that *peshkosh* is payable in respect of the land held by the plaintiffs.

The learned pleader for the appellant has not pressed the point taken in the Court below that the Public Demands Recovery Act was not applicable for the purpose of enforcing the payment. The terms of the Act of 1895 are sufficient to meet the point and it could not have been urged with success.

The appeal must, accordingly, be dismissed with costs.

L. R. *Appeal dismissed.*

APPELLATE CIVIL.

Before Richardson and Walmsley JJ.

PRAN KRISHNA BHANDARI

v.

SURATH CHANDRA ROY.*

1918

Jan. 25.

Partition—Suit for partition—Jurisdiction—Partition Act (IV of 1893) s. 4—"Court"—"Dwelling house."

A, B and C were the joint owners of a property. A sold his share to Z, Z instituted a suit for partition. B and C claimed to purchase Z's share under s. 4 of the Partition Act. The Court of first instance made a preliminary decree and appointed a Commissioner and subsequently made a final decree. B and C appealed. The lower Appellate Court remanded the case for the determination of the suit under s. 4 of the said Act :—

Held, that the word "Court" in s. 4 of the Partition Act included the Appellate Court. The latter like the trial Court was bound, upon any member of the family who was a shareholder undertaking to buy the share of the transferee, to make an appropriate order in pursuance of which the steps necessary to carry out the provisions of the section would be taken either in the one Court or in the other.

Held, also, that in connection with a conveyance or a partition of a "dwelling house" the word would generally mean not only the hou e itself but also the land and appurtenances which were ordinarily and reasonably necessary for its enjoyment.

Kshirode Chunder Ghosal v. *Saroda Prosad Mitra* (1) referred to.

SECOND APPEAL by Pran Krishna Bhandari, the plaintiff.

The facts are briefly these. The lands in dispute, comprising about 15 cottahs in area with a building,

* Appeal from Order, No. 230 of 1915, against the order of Upendra Chandra Mukerjee, Subordinate Judge of Hooghly, dated Feb. 18, 1915, reversing the order of Amrita Lal Mukerjee, Munsif of Howrah, dated Nov. 28, 1913.

(1) (1910) 12 C. L. J. 525, 532.

1918

PRAN KRISHNA BHANDARI v. SURATH CHANDRA ROY.

originally formed the joint property of three brothers. On the 19th October 1911, one of the brothers sold his one-third share to the plaintiff who was a stranger to the family. On the 27th February 1913, the plaintiff instituted a suit for partition of the property. On the 30th November 1913, the Court of first instance made a preliminary decree, and appointed a Commissioner who made a plan and carried out the division of the property. The latter was subsequently adopted by the final decree of the said Court made on the 28th November 1913. The defendants claimed the right to purchase the share sold under section 4 of the Partition Act, and they preferred an appeal. On the 28th February 1915, the lower Appellate Court remanded the case to the Court of first instance for the determination of the suit by making a valuation of the share and allowing the defendants to purchase the same in accordance with the said value.

From that decision the plaintiff preferred this appeal to the High Court.

Babu Mahendra Nath Roy and *Babu Manmatha Nath Roy*, for the appellant.

Babu Sib Chandra Palit, for the respondent.

RICHARDSON J. This is an appeal from an order of the learned Subordinate Judge of Hooghly made under section 4 of the Partition Act (IV of 1893) in the course of a suit for partition. Under section 8 of the Act such an order must be deemed to be a decree within the meaning of section 2 of the Civil Procedure Code, so that an appeal lies therefrom to this Court. The property in question is a small property about 15 cottahs in area. There are some buildings upon it and a part of the area is occupied by a tank. The property was originally joint property belonging to three brothers. On the 9th October 1911, one of the three

brothers (defendant No. 1 in the suit) sold his one-third share to the plaintiff, a stranger to the family. The suit for partition was instituted by the plaintiff on the 27th February 1913, and the preliminary decree was made on the 20th November 1913. Then a Commissioner was appointed who made a plan and carried out a division of the property which was subsequently adopted by the Court in the final decree which was made on the 28th November 1913. In their written statement the defendants Nos. 2 and 3 (the owners of the remaining two-thirds share of the property) claimed the right to purchase the share sold, but thereafter they seem to have taken no active part in the proceedings up to the final decree. From the final decree, however, they preferred an appeal and in the memorandum of appeal and at the hearing, they again claimed and insisted on their right of purchase under section 4 of the Act. The learned Subordinate Judge, thereupon, made the order under that section to which the plaintiff takes exception. The points raised on behalf of the plaintiff are two in number.

It is contended in the first instance that the learned Subordinate Judge had no jurisdiction after the final decree in the suit had been made in the trial Court to make an order under section 4. As to that I agree with the learned Subordinate Judge. The terms of section 4 are quite general. It says that where a share of a dwelling-house belonging to an undivided family has been transferred to a person who is not a member of such family and such transferee sues for partition, the Court shall, if any member of the family being a shareholder shall undertake to buy the share of such transferee, make a valuation of such share and so forth. There seems to be no reason why the word "Court" should be confined to the trial Court and should not include the Appellate Court.

1918

PRAN KRISHNA BHANDARI v. SURATH CHANDRA ROY.

RICHARDSON J.

The appeal is a continuation of the suit. If the section applies to the Appeal Court, as in my opinion it does, that Court like the trial Court, is bound upon any member of the family who is a shareholder undertaking to buy the share of the transferee, to make an appropriate order in pursuance of which the steps necessary to carry out the provisions of the section will be taken either in the one Court or in the other.

It has been held in a number of cases that an application under the section need not necessarily be made upon the institution of the suit but may be postponed till after the preliminary decree: *Kshirode Chunder Ghoshal* v. *Saroda Prosad Mitra* (1). If that is so, and an undertaking to buy given to the Court after the stage at which the preliminary decree is made, may or must be accepted, there seems no reason why the operation of the section should be restricted to the trial stage and should not also extend to the appellate stage of the suit.

Some reliance was placed on section 10 of the Act. That section provides that the Act should apply to suits instituted before its commencement in which no scheme for the partition of the property has been finally approved by the Court. The section merely defines how far the Act is to have retrospective operation. For the present purpose, the section appears to be entirely irrelevant.

The contention therefore that the Appellate Court had no jurisdiction, in my opinion, fails.

The second point turns upon the meaning of the words "dwelling-house" as used in section 4. It has been said that the word "house" is an ambiguous word and possibly some ambiguity attaches also to the compound word "dwelling-house". In connection,

(1) (1910) 12 C. L. J. 525.

however, with a conveyance or a partition of a dwelling-house, the word will generally mean not only the house itself, but also the land and appurtenances which are ordinarily and reasonably necessary for its enjoyment: *Kshirode Chunder Ghosal* v. *Saroda Prosad Mitra* (1). As I have said the area of the whole property is only 15 cottahs. There are buildings upon it in which the defendants live and the learned Subordinate Judge has found that the land which was allotted to the plaintiff in accordance with the Commissioner's report is a curtilage appurtenant to the defendants' house. It is said that this finding rests on no evidence. The learned Subordinate Judge had before him the report of the Commissioner and the Commissioner's map. That being so, it is difficult to say that the learned Judge had before him no materials sufficient in law to support his conclusion.

No objection has been taken to the form of the Subordinate Judge's decree by which the final decree of the trial Court was set aside, and the case remitted to that Court to be dealt with according to the directions given. To put the matter beyond doubt, it may well be to add as to the costs which have been incurred in the trial Court, that those costs will be in the discretion of the Munsif. Subject to this addition to the Subordinate Judge's decree, the appeal should be dismissed with costs.

WALMSLEY J. I agree.

Appeal dismissed.

L. R.

(1) (1910) 12 C. L. J. 525, 535.

PRIVY COUNCIL.

P.C.*
1918

Feb. 23.

IMAMBANDI
v.
MUTSADDI.

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Mahomedan Law—Marriage, validity of—Guardianship of minor—Power of mother as de facto guardian to alienate her minor children's interests in immoveable property so as to bind the infants—Absence of entries in account books as evidence against validity of marriage where regular payments to other wives are shown by other entries—Production at first hearing of suit of documentary evidence relied on by parties—Civil Procedure Code, 1908, O. XIII, r. 1—Practice of Indian Courts in citing decisions of Foreign Courts.

A wealthy Mahomedan died leaving widows, two admittedly his lawful wives and children by each of them, and a third one Z who claimed to be his married wife, but the validity of whose marriage was disputed. She had two minor children, and by a deed of 10th June 1906, without having been legally appointed their guardian, she purported to transfer the shares of both herself and her children in the property of the deceased to the plaintiffs who sued for a declaration of the title and status of their vendor, and for a decree for possession of the shares covered by the deed of sale. As to the validity of the marriage of Z, entries in the books of account of the deceased tendered in evidence by the contesting defendants (the sharers other than Z and her children) showed regular payments to the admittedly lawful wives, but the books contained no entries of payments to Z. They were not admitted in evidence by the lower Courts.

Held by the Judicial Committee (who held the books of account admissible), that there was clear evidence of a reliable character regarding the acknowledgment by the deceased of the children of Z as his legitimate issue, which gave rise to a legal presumption of her marriage; and that such presumption was not displaced by the mere inferences the contesting defendants sought to draw from the absence of entries in her favour in

* *Present*: LORD SHAW, SIR JOHN EDGE, MR. AMEER ALI, SIR WALTER PHILLIMORE, BART., AND SIR LAWRENCE JENKINS.

the account books. The marriage was, therefore, valid under the decision in *Mahatala Bibee* v. *Haleemoozaman* (1), and Z and her children were entitled to their shares in the inheritance.

Held, also, that Z had no power to deal with the minors' shares as she had done, and that only her own share passed under the deed of sale. By Mahomedan law the mother is entitled only to the custody of the person of her minor child up to a certain age according to the sex of the child. But she is not the natural guardian ; the father alone, or, if he be dead his executor (under the Sunni law) is the legal guardian.

Mata Din v. *Ahmad Ali* (2) referred to and discussed.

On a review of the provisions and principles of the Mahomedan law on the question of how far, and under what circumstances, a mother's dealings with the property of her minor child are binding on the infant :—

Held, that one who has charge of the person or property of a minor without being his legal guardian, and who may therefore be conveniently called a "*de facto* guardian," has no power to convey to another any right or interest in immoveable property which the transferee can enforce against the infant : nor can such transferee, if let into possession of the property under such unauthorised transfer, resist an action in ejectment on behalf of the infant as a trespasser. It follows that being himself without title he cannot seek to recover property in the possession of another equally without title.

Ayderman Kutti v. *Syed Ali* (3) referred to and commented on.

Order XIII, rule 1 of the Civil Procedure Code, 1908, requires the parties or their pleaders to produce at the first hearing of the suit all the documentary evidence of every description in their possession or power "on which they intend to rely." But it does not exclude the discretion of the Court to receive any such documentary evidence at any subsequent stage.

Their Lordships of the Judicial Committee deprecated the practice in some of the Indian Courts of referring largely to decisions of Foreign Courts, to which Indian practitioners could not be expected to have access, which were often based on considerations and conditions totally differing from those applicable to or prevailing in India, and are only likely to confuse the administration of justice.

APPEAL 73 of 1914 from a judgment and decree (30th August 1911) of the High Court at Calcutta, which affirmed a judgment and decree (14th July 1910) of the Subordinate Judge of Saran.

(1) (1881) 10 C. L. R. 293.

(2) (1912) I. L. R. 34 All. 213 ; L. R. 39 I. A. 49.

(3) (1912) I. L. R. 37 Mad. 514.

1918

IMAMBANDI v. MUTSADDI.

Defendants 1 to 7 were appellants to His Majesty in Council.

For the purpose of this report, the facts, pleadings and evidence in the suit are sufficiently stated in the judgment of the Judicial Committee.

One Mahomed Ismail Ali Khan of Siwan, in the district of Saran, died on 21st March 1906 leaving three widows, Bibi Imambandi (appellant 1), Bibi Amir Jahan (appellant 5), and Musammat Enayet Zohra (respondent 3), and seven children, Abdul Majid Khan, Abdul Rashid Khan, and Bibi Hasna (appellants 2, 3, and 4) by Imambandi, Bibi Rahmatunnessa and Bibi Habibunnessa (appellants 6 and 7) by Amir Jahan, and Mahomed Yakub, and Nur Mahamdi Jan (respondents 4 and 5) by Enayet Zohra.

On 10th June 1906, Enayet Zohra for herself and as guardian of her two minor children, executed in favour of Haji Mutsaddi and Gulzar Hossein, plaintiffs, (now respondents 1 and 2), a conveyance of her own and her children's shares in the property inherited by them from Mahomed Ismail Ali Khan.

In due course respondents 1 and 2 applied to the Deputy Collector for registration of their names as owners of those shares: the application was opposed by Imambandi and Amir Jahan, who asserted that Enayet Zohra was never married to Ismail Ali Khan, and that her children were illegitimate, and the application was eventually dismissed, Haji Mutsaddi and Gulzar Hossein being referred to a suit in the Civil Court for establishment of their rights.

They thereupon instituted the present suit against the appellants and the respondents 3 to 5 for a declaration that Enayet Zohra was the "nikahi" wife, and the respondents 4 and 5 the legitimate children of Ismail Ali Khan and that as such they were entitled to the shares in his properties purchased by the

plaintiffs respondents by virtue of the conveyance of 10th June 1906. The suit prayed for possession and for other relief.

The appellants denied the alleged marriage and asserted that her children were illegitimate. The respondents 3 to 5 did not defend the suit.

On the only issues now material, namely as to the marriage of respondent 3, and the legitimacy of her children; and the genuineness, and effect in creating title on respondents 1 and 2, of the deed of 10th June 1906, and whether the appellants could question the transfer, the Subordinate Judge decided these issues in favour of respondents 1 and 2 and decreed the suit with costs.

On appeal, the High Court (MOOKERJEE and CARNDUFF JJ.) held that respondent 3 was the lawfully married wife of Ismail Ali Khan, and respondents 4 and 5 were his legitimate children; that the question whether respondent 3 as *de facto* guardian of her children was competent to alienate their shares did not properly arise in the present suit; that the appellants did not claim through those children, but, on the contrary, completely repudiate any claim by them, and that it was not open to the appellants to contend that they would be prejudiced if the suit were decreed. The High Court accordingly dismissed he suit with costs.

ON this appeal,

Upjohn K.C. and *Abdul Majid*, for the appellants, contended that the books of account tendered as evidence by the appellants were wrongly held to be inadmissible by the Courts in India; and it was submitted they were admissible under the Evidence Act, 1872, and if admitted would have negatived any presumption from the evidence as to the alleged

1918

IMAMBANDI v. MUTSADDI.

acknowledgment. The concurrent findings of fact by the lower Courts were not conclusive. Reference was made to *Gobindsundari Debi* v. *Jagadamba Debi* (1). Neither the alleged marriage nor the acknowledgment was established by the evidence. For the requirements of the Mahomedan Law as to acknowledgment, which is not a mere matter of evidence, but one of substance, reference was made to Baillie's Digest of Mahomedan Law (Ed. 1865), pages 4, 5, 7 and 749; Baillie's Mahomedan Law of Inheritance (Ed. 1824), pages 28, 31; Fatawai Alamgiri, Vol. IV, page 48; and *Aklemanessa Bibee* v. *Mahomed Hatem* (2). No presumption of marriage arises, as the evidence of acknowledgment was not sufficiently specific to create such a presumption. Reference was made to *Ashrufood Dowlah Ahmed Hossein* v. *Hyder Hossein Khan* (3), *Butoolun* v. *Koolsoom* (4), and *Mahatala Bibi* v. *Haleemoozaman* (5). As to the respondents' title, the deed in their favour was invalid as the mother had no power, being merely a *de facto* guardian, to alienate the shares of the minor children. No title, therefore, to those shares was conveyed to respondents 1 and 2 by the deed of 10th June 1906: *Mata Din* v. *Ahmad Ali* (6). The plaintiff-respondents must succeed on the strength of their own case, and not on any defect in the case of the appellant.

DeGruyther, *K.C.*, and *Sir William Garth*, for the respondents 1 and 2 (who were called upon only as to the power of the mother to alienate the minors' shares), contended that she had power to make the transfer of the minors' shares to the plaintiff-respondents; and that in any case the deed was not void but only voidable; and if not found to be for their

(1) (1870) 6 B. L. R. 168, 171.
(2) (1904) I. L. R. 31 Calc. 849, 856.
(3) (1866) 11 Moo. I. A. 94.
(4) (1876) 25 Suth. W. R. 444.
(5) (1881) 10 C. L. R. 293.
(6) (1912) I. L. R. 34 All. 213; L. R. 39 I. A. 49.

benefit, it could be avoided by the minors when they came of age. The point as to whether an alienation by a *de facto* guardian was void or voidable was expressly not decided in *Mata Din* v. *Ahmad Ali* (1). The deed in that case was set aside on the grounds that there was no necessity, and that the minors did not consent to it on attaining majority. Among conflicting decisions, the majority of them held that if the alienation was not for the benefit of the minors, it was voidable: reference was made to *Sitaram* v. *Amir Begam* (2), *Nizamuddin Shah* v. *Anandi Prasad* (3), *Majidan* v. *Ram Narain* (4), *Ummi Begam* v. *Kesho Das* (5), *Syedun* v. *Velayet Ali Khan* (6), *Bhutnath Dey* v. *Ahmed Hossain* (7), *Moyna Bibi* v. *Banku Behari Biswas* (8), *Mafazzal Hossein* v. *Basid Sheikh* (9), *Ramcharan Sannyal* v. *Anukul Chandra Acharjya* (10), *Hurbai* v. *Hiraji Byramji Shanja* (11), *Baba* v. *Shivappa* (12), *Pathummabi* v. *Viltil Ummachabi* (13) followed in *Durgazi Row* v. *Fakeer Sahib* (14), *Abdul Khader* v. *Chidambaram Chattiyar* (15) and *Thotolli Kotilan Ali Umma* v. *Kunhammad* (16); and *Ayderman Kutti* v. *Syed Ali* (17) in which last case all the authorities were considered and it was held that an alienation by a *de facto* guardian of a minor's property was not void, but was in suspense, so that the minor could, if he wished, acquiesce in the alienation and in that case it was considered to have been valid from the date it was

(1) (1912) I. L. R. 34 All. 213; L. R. 39 I. A. 49.
(2) (1886) I. L. R. 8 All. 324, 338.
(3) (1896) I. L. R. 18 All. 373.
(4) (1903) I. L. R. 26 All. 22.
(5) (1908) I. L. R. 30 All. 462.
(6) (1872) 17 Suth. W. R. 239.
(7) (1885) I. L. R. 11 Calc. 417.
(8) (1902) I. L. R. 29 Calc. 473.
(9) (1906) I. L. R. 34 Calc 36.
(10) (1906) I. L. R. 34 Calc. 65.
(11) (1895) I. L. R 20 Bom. 115, 121.
(12) (1895) I. L. R. 20 Bom 199.
(13) (1902) I. L. R.26 Mad. 734.
(14) (1906) I. L. R. 30 Mad. 197.
(15) (1908) I. L. R. 32 Mad. 276.
(16) (1910) I. L. R. 34 Mad. 527.
(17) (1912) I. L. R. 37 Mad. 514.

1918

IMAMBANDI v. MUTSADDI.

made. [LORD SHAW referred to *Amba Shankar* v. *Ganga Singh* (1) and *Wala Quadar* v. *Muhammad Azim* (2)]. The question whether the conveyance to respondents 1 and 2 is binding on the minors now, or when they attain majority, or was for their benefit, was not an issue raised in the suit, and no evidence has been adduced upon it. [SIR W. PHILLIMORE. After the minors have been made defendants, and a decree for possession under the deed has been made, will they not be estopped?] The status of the minors is a *res judicata* under the decree: the respondents 1 and 2 undertake to raise no plea of estoppel on any future proceedings by them as to the validity of the alienation.

Feb. 28. The judgment of their Lordships was delivered by MR. AMEER ALI. This is an appeal from a judgment and decree of the High Court of Calcutta, dated the 30th August, 1911, which affirmed the decree of the Subordinate Judge of Saran awarding to the plaintiffs possession of a share in certain landed property situated in that district.

The property in suit belonged originally to one Ismail Ali Khan, a wealthy Mahomedan inhabitant of the subdivision of Siwan in the Saran district. The plaintiffs allege that on his death in March 1906 he left him surviving three widows and several children, and that from one of these widows, named Enayet-uz-Zohra, acting for herself and for her two minor children, they purchased the share in suit for the possession of which they brought the present action.

It appears that shortly after Ismail Ali Khan's death, the contesting defendants 1 to 7 applied to the Revenue Courts for mutation of names (as proprietors) in the Collector's records, and, as usually happens

(1) (1905) 9 Oudh Cas. 97. (2) 1915) 18 Oudh Cas. 168.

in these cases in India, especially in Mahomedan families, immediately this application was made, a claim was put forward on behalf of Enayet-uz-Zohra and her children that they were equally entitled with the other heirs of Ismail Ali Khan to have their names entered as co-sharers in the estate by right of inheritance, the allegation being that Zohra was one of his lawfully wedded wives and that her children were his legitimate issue. The Revenue Courts rejected her claim, holding that it was not established to their satisfaction that she was Ismail Ali Khan's married wife or that the children were his lawful issue. They accordingly made an order directing the registration of the contesting defendants' names in succession to Ismail Ali Khan.

It should be mentioned here that the defendants 1 and 5 are admittedly Ismail Ali Khan's married wives, defendants 2, 3 and 4 are his issue by defendant 1, and defendants 6 and 7 his daughters by defendant 5.

The plaintiffs are dealers in hide and live also at Siwan. There seems to have been litigation between them and Ismail Ali Khan in his life-time, and since his death they seem to have espoused Zohra's cause. The deed executed by Zohra bears date the 10th June 1906, and purports to convey to the plaintiffs the shares of both herself and her minor children, and in the suit they are included as defendants 8 to 10. The reliefs sought are of a twofold character: *first*, a declaration of the title and status of the plaintiffs' vendors; and, *secondly*, a decree in favour of the plaintiffs for possession of the shares covered by the deed of sale.

The contesting defendants denied, as they had done in the Revenue Courts, that Zohra was one of Ismail Ali Khan's married wives or that her children were his legitimate issue, and they further contended

1918

IMAMBANDI v. MUTSADDI.

that the shares the plaintiffs claimed to recover did not pass under the sale. The sixth issue framed by the Subordinate Judge seems to relate to this point.

The plaint was filed on the 25th March 1909, but it does not appear to have been admitted until the 2nd April. The contesting defendants filed their written statements in July 1909; after that the case dragged its slow length along until the 18th June 1910, when the actual trial began. In the interim, however, various interlocutory orders were made, including an order for the appointment of Zohra as guardian *ad litem* for her children (though her interest in the suit was clearly adverse to theirs). Admittedly she was never appointed under the Guardian and Wards Act (VIII of 1890) a guardian of their property.

The examination in Court of the plaintiffs' witnesses commenced on the 16th June 1910; on the 18th June (the date given in the judgment of the High Court does not appear to agree with the date in the order sheet) they applied for a summons against the defendants for the production of certain *bahis*, or account books, belonging to Ismail Ali Khan for the Fasli years 1294 to 1313 (1887—1906). The order on this application was as follows: "I decline to issue summons at this stage." And there, so far as the plaintiffs were concerned, the matter was allowed to rest.

As a large part of the judgments of both the Courts in India is occupied with an examination of these *bahis*, viz., whether they are reliable or not, it is necessary to mention that these very books had been produced and filed in Ismail Ali Khan's life-time on his behalf in the litigation between him and the plaintiffs; after his death they were returned to the contesting defendants' pleader, when it was discovered that a large number of leaves were abstracted from several of the books. This was represented to the

presiding officer of the Court where the books were filed, but there is nothing to show the result of the representation. The plaintiffs' case appears to have closed on the 26th June, and on the following day the defendants commenced to examine their witnesses. On the same day they produced the *bahis*. The Subordinate Judge's order on their petition is in these terms: "On the defendants' application filing therewith the *bahis* from 1204 to 1311 Fasli, it is ordered that they be kept with the records, and that the plaintiffs' pleader be informed accordingly." About this time the missing leaves turned up mysteriously. The trial Judge says he received them by post from some unknown source; and apparently after receipt, he handed them to the proper officer. Upon becoming aware of this fact the defendants applied to the Court that the torn-out leaves thus re-discovered might be admitted in evidence; and on the 29th June, whilst the trial was proceeding and evidently in the presence of the pleader for the opposite party, the Subordinate Judge ordered that the leaves in question should be used as evidence, and marked them as Exhibits F 1 to F 5.

It is hardly likely that the leaves were originally abstracted by the defendants and that this roundabout way was adopted for the purpose of getting the books admitted as evidence. On the face of it, the suggestion appears to be absurd.

The use the contending defendants wished to make of the account books, was of a negative character. These books contain regular entries of payments by Ismail Ali Khan to his admitted wives, defendants 1 and 5, under the honorific designation of *Haveli Kalan* ("senior mansion") and *Haveli Khurd* ("junior mansion"), being euphemisms for wives. There is no entry, however, of any payment to Zohra.

1918

IMAMBANDI v. MUTSADDI.

The defendants accordingly asked the Court to draw from the absence of any such entry in her name the inference that she was not Ismail Ali Khan's wife and did not hold the same position as the other ladies. Counsel for the plaintiffs seems to have been greatly impressed by this argument; in fact, he appears to have conceded that, if the books were to be relied upon, Zohra's claim must fail. He was thus driven to challenge their genuineness. The Subordinate Judge appears to have taken the same view; he thought that the books must be first eliminated before the direct evidence could be properly appraised, and this reasoning runs through the judgments of both the Courts in India. The trial Judge on certain grounds came to the conclusion that the *bahis* must be put aside from consideration as unreliable. He then proceeded to discuss the oral testimony; and in the result found that Zohra was, in fact, a wife of Ismail Ali Khan, and that the defandants 9 and 10 were his children by her. He accordingly decreed the plaintiffs' claim. And his decree has been affirmed by the High Court of Calcutta. The learned Judges of the High Court also felt impressed with the absence of entries in the *bahis* in Zohra's name, and therefore proceeded to deal with them first. This mode of treatment has been strongly assailed, not without reason, before this Board. It seems to their Lordships that the true criterion for the determination of the question at issue was missed by both the Courts. The onus of establishing the title of their vendors lay primarily on the plaintiffs; the evidence furnished by the books was negative and inferential, and in substance directed to the corroboration of the defendants' witnesses, who denied that Zohra was one of Ismail Ali Khan's wives. Rule 1, Order XIII of the Civil Procedure Code requires the parties or their pleaders to produce at the first hearing

of the suit all the documentary evidence of every description in their possession or power "on which they intend to rely." But it does not exclude the discretion of the Court to receive any such documentary evidence at any subsequent stage. In the present case the books had been filed previously in another Court, and when produced on the 27th June they were in fact received and ordered to be placed with the records. There seems to have been no objection to their reception for non-compliance with the provisions of the Code. If the plaintiffs had taken notes of certain entries in the books, as is alleged they had done when the *bahis* were in the other Court, they could surely have cross-examined the defendants' witnesses, who were called to prove the books, as to the discrepancies. Their Lordships are not satisfied that the books are not the genuine account-books of Ismail Ali Khan. What effect the absence in them of entries in Zohra's name may have in the consideration of the general evidence is another matter.

In the absence of any statutory provision making compulsory the registration of Mahomedan marriages, the Indian Courts, in case of a dispute as to the *factum* of a marriage, are usually left to discover, or attempt to discover, the truth from a mass of conflicting and often very unsatisfactory evidence of witnesses. Such has been the burden cast on the Courts in the present instance. The plaintiffs have endeavoured to prove in two ways that Zohra was one of Ismail Ali Khan's wives, viz., *first*, by direct evidence of an actual marriage; and, *secondly*, by the ackowledgment by him of her chidren as his legitimate issue, and by the presumption of marriage, arising from such acknowledgment. The defendants, on the other hand, tried to show that Zohra was a woman of loose character, with the object apparently

1918

IMAMBANDI v. MUTSADDI.

of establishing that it was most unlikely a man in Ismail Ali Khan's position would marry such a person. They also called a number of witnesses, who are said to have been on terms of intimacy with him, to state that they never heard him speak of Zohra as his wife. Including the inference from the account books, all the evidence on the defendants' side is purely and naturally negative. In their Lordships' opinion, the oral testimony regarding the solemnisation of a marriage accompained by ostentatious ceremonies and high dower is by no means satisfactory, and if the case had stood there, the absence of Zohra's name in Ismail Ali Khan's account books might have weighed heavily against her. But their Lordships find clear evidence of a reliable character regarding his acknowledgment of her children. Her case, therefore, comes within the rule of Mahomedan law to which Garth, C. J. and Wilson, J. (afterwards Sir Arthur Wilson), gave expression in *Mahatala Bibee* v. *Prince Ahmed Haleem-ooz-Zaman* (1).

In their Lordships' opinion, the legal presumption arising in favour of Zohra from the acknowledgment of the children is not displaced by the mere inference the defendants seek to draw from the absence of entries in her favour in Ismail Ali Khan's account books. Such absence is capable of explanation, and it is possible she could have explained it had her attention been called to the matter. One explanation, however, is on the surface : on the facts proved in the case it is quite clear that this lady's father, though belonging to the same clan as Ismail Ali Khan, was a man considerably inferior in social status; it is not at all unlikely that the deceased was not particularly proud of his connection with the daughter. This would

(1) (1881) 10 C. L. R. 293.

explain both the absence of the entries and his reticence about her to ordinary acquaintances and even friends. On the whole, their Lordships are of opinion that both Zohra and her children are entitled to their legal shares in the inheritance of Ismail Ali Khan. But the Courts in India have awarded to the plaintiffs, on the basis of the deed of purchase from Zohra, a decree for possession of her share and the shares of defendants 9 and 10. And the question is whether they have acquired any title to the infants' shares under the sale by the mother. The defendants objected in the High Court to the decree of the Subordinate Judge on the ground that she had no power to convey her children's interest to the plaintiffs. The learned Judges overruled the objection on the ground that the question did not arise in the present case. Their Lordships regret to have to differ from this view. This is an action in ejectment; the defendants are in possession; the plaintiffs, if they are to obtain possession of the minors' shares, must do so on the strength of their own title. It is essential, therefore, to consider whether the title they allege to have acquired under the conveyance by Zohra is well-founded.

The question how far, or under what circumstances according to Mahomedan law, a mother's dealings with her minor child's property are binding on the infant has been frequently before the Courts in India. The decisions, however, are by no means uniform, and betray two varying tendencies: one set of decisions purports to give such dealings a qualified force; the other declares them wholly void and ineffective. In the former class of cases, the main test for determining the validity of the particular transaction has been the benefit resulting from it to the minor; in the latter, the admitted absence of authority or power on

1918

IMAMBANDI v. MUTSADDI.

the part of the mother to alienate or encumber the minor's property.

In this conflict of opinion, their Lordships think it desirable that a definite rule should, if possible, be laid down; and with this object they propose to review briefly the provisions and principles of the Mahomedan law, as they apprehend it, governing the subject.

It is perfectly clear that under the Mahomedan law the mother is entitled only to the custody of the person of her minor child up to a certain age according to the sex of the child. But she is not the natural guardian; the father alone, or, if he be dead, his executor (under the Sunni law), is the legal guardian. The mother has no larger powers to deal with her minor child's property than any outsider or non-relative who happens to have charge for the time being of the infant. The term "*de facto* guardian" that has been applied to these persons is misleading: it connotes the idea that people in charge of a child are by virtue of that fact invested with certain powers over the infant's property. This idea is quite erroneous; and the judgment of the Board in *Mata Din* v. *Ahmad Ali* (1) clearly indicated it. There, an infant's share was sold by the elder brother, in whose charge the child was, along with his own share, to pay a joint ancestral debt. The vendee at the time of the sale was in possession of the whole property under a mortgage executed by the ancestor. On attaining majority the younger brother, ignoring the sale, brought a suit against the vendee-mortgagee for the redemption of his own share. The defence set up was that the sale by the infant's *de facto* guardian, made for a valid necessity, was binding on the infant. The lower Courts decreed the plaintiff's claim; on appeal to this

(1) (1912) I. L. R. 34 All. 213; L. R. 39 I. A. 49.

Board, the arguments proceeded on the same lines as in the present case, though in reverse order.

Lord Robson, in delivering the judgment of the Board, observed as follows :—

"It is urged on behalf of the appellant that the elder brothers were *de facto* guardians of the respondent, and, as such, were entitled to sell his property, provided that the sale was in order to pay his debts and was therefore necessary in his interest. It is difficult to see how the situation of an unauthorised guardian is bettered by describing him as a '*de facto*' guardian. He may, by his *de facto* guardianship, assume important responsibilities in relation to the minor's property, but he cannot thereby clothe himself with legal power to sell it."

And he went on to add :—

"There has been much argument in this case in the Courts below and before their Lordships, as to whether, according to Mahomedan law, a sale by a *de facto* guardian, if made of necessity, or for the payment of an ancestral debt affecting the minor's property, and if beneficial to the minor, is altogether void or merely voidable. It is not necessary to decide that question in this case."

And he then proceeded to state the reasons why that was not considered necessary.

This latter passage in Lord Robson's judgment has created the impression that their Lordships' decision was confined to the special facts of that case and left open the general question regarding the validity of alienations by unauthorised guardians of the property of minors.

As already observed, in the absence of the father under the Sunni law, the guardianship vests in his executor. If the father dies without appointing an executor (*wasi*) and his father is alive, the guardianship of his minor children devolves on their grandfather. Should he also be dead, and have left an executor, it vests in him. In default of these *de jure* guardians, the duty of appointing a guardian for the protection and preservation of the infants' property devolves on the Judge as the representative of the Sovereign (Baillie's "Digest," ed. 1875, p. 689;

1918

IMAMBANDI v. MUTSADDI.

Hamilton's *Hedâya*, Vol. IV, p. 555). No one else has any right or power to intermeddle with the property of a minor, except for certain specified purposes, the nature of which is clearly defined. But the powers of even the *de jure* guardians are confined within legal limits. For example, whilst an executor-guardian (*wasi*) may "sell or purchase movables on account of the orphan under his charge either for an equivalent or at such a rate as to occasion an inconsiderable loss," dealings with his immovable property are subjected to strict conditions (Baillie's "Digest," p. 687). The reason for the restrictions is thus given in the *Hedâya* (Vol. IV, p. 553):—

"The ground of this" (the difference in the power of dealing with the two kinds of property) "is that the sale of movable property is a species of conservation, as articles of that description are liable to decay, and the price is much more easily preserved than the article itself. With respect, on the contrary, to immovable property, it is in a state of conservation in its own nature whence it is unlawful to sell it—unless, however, it be evident that it will otherwise perish or be lost, in which case the sale of it is allowed."

In fact, the Mussulman law appears to draw a sharp distinction between movable and immovable property (*a'kâr*) in respect of the powers of guardians, as will be seen from the following passage in Baillie's "Digest," p. 689:—

"With regard to the executor of a mother or brother,—when a mother has died leaving property and a minor son, and having appointed an executor, or a brother has died leaving property and a minor brother, and having appointed an executor, the executor may lawfully sell any thing but *akar*[a] belonging to the estate of the deceased, but can neither sell the *akar*, nor lawfully buy anything for the minor but food and clothing, which are necessary for his preservation. The executor of a mother has no power to sell anything that a minor has inherited from his father, whether movable or immovable, and whether the property be involved in debt or free from it. But what he has inherited from herself when it is free from debts and legacies, the executor may sell what is movable

[a] *akar* is immovable property, and includes houses, groves, orchards, &c.

but he cannot sell *akar*. If the estate is involved in debt or legacies, and the debt is such as to absorb the whole, he may sell the whole, the sale of *akar* coming within his power: and if the debt does not absorb the whole, he may sell as much of it as is necessary to defray the debts, and as to his power to sell the surplus there is the same difference of opinion as has been stated above."

When the mother is the father's executrix, or is appointed by the Judge as guardian of the minors, she has all the powers of a *de jure* guardian. Without such derivative authority, if she assumes charge of their property of whatever description and purports to deal with it, she does so at her own risk, and her acts are like those of any other person who arrogates an authority which he does not legally possess. She may incur responsibilities, but can impose no obligations on the infant. This rule, however, is subject to certain exceptions provided for the protection of a minor child who has no *de jure* guardian. A fatherless child is designated in the law-books an "infant-orphan" (*yeteem saghir*). The *Hedâya* classifies the acts that may have to be done for an infant under three heads. It says:—

"Acts in regard to infant-orphans are of three descriptions, viz.: (i) Acts of guardianship, such as contracting an infant in marriage, or selling or buying goods for him, a power which belongs solely to the *walee*, or natural guardian, whom the law has constituted the infants substitute in those points: (ii) acts arising from the wants of an infant, such as buying or selling for him on occasions of need, or hiring a nurse for him, or the like, which power belongs to the maintainer of the infant, whether he be the brother, uncle, or (in the case of a foundling) the *mooltakit**, or *taker-up*, or the mother, provided she be the maintainer of the infant: and as *these* are empowered with respect to such acts, the *walee*, or natural guardian, is also empowered with respect to them in a still superior degree; nor is it requisite, with respect to the *guardian*, that the infant be in his immediate protection; (iii) acts which are *purely advantageous*† to

* A *mooltakit* is a person who undertakes to bring up a foundling or an orphan-child.

† In the original the words are *nafa mahaz*, which mean "unmixed benefit."

1918

IMAMBANDI v. MUTSADDI.

the infant, such as accepting presents or gifts, and keeping them for him, a power which may be exercised either by a *mooltakit*, a brother, or an uncle, and also by the infant himself, provided he be possessed of discretion, the intention being only to open a door to the infants' receiving benefactions of an advantageous nature." (Vol. IV, p. 124, Bk. XLIV).

The examples given under the second head indicate the class of cases in which the acts of an unauthorised person who happens to have charge of a child are held to be binding on the infant's property. They also help to explain and illustrate the extent of such "*de facto* guardian's" powers. The permissibility of these acts depends on the emergency which gives rise to the imperative necessity for incurring liabilities without which the life of the child or his perishable goods and chattels may run the risk of destruction. For instance, he may stand in immediate need of aliment, clothing, or nursing; these wants must be supplied forthwith. He may own "slaves" or live-stock; food and fodder must be immediately procured. And these imperative wants may recur from time to time. Under such circumstances power is given to the lawful guardian to incur debts or to raise money on the pledge of the minor's goods and chattels (*matâ'*)* (*Majma'-ul-Anhar*, Vol. II, p. 571). And this power, in the absence of a *de jure* guardian, the law extends to the person who happens to have charge of the child and of the child's property, though not a constituted or authorised guardian.

There is no reference to the pledge or sale of immovable property (*a'kâr*), as the power of dealing with that class of property is confined to the *de jure* guardians, and is treated in the *Fatâwai-Alamgiri* in a separate chapter (Baillie's "Mahommedan Law of Sale," Chapter XVI).

* Mr. Hamilton translates *matâ'* as meaning "personal chattels."

It is to be observed that under the third "description" of acts that may be needful for an infant, a person in charge of a child, although not a *de jure* guardian, may validly accept on behalf of his ward an unburdened bounty, it being an act "purely advantageous" to the child, to use the expression of the *Hedâya*.

The reasoning on which it is sought to give to persons who happen to have charge of the person and property of a child, and are, therefore, called "*de facto* guardians," the same powers as are possessed by *de jure* guardians, is purely inferential. It proceeds on the analogy of a dealing by an outsider who purports to sell another's property without any authority from the real owner. Such a person in the Hanafi law is called a *fazûli*, or, as Mr. Hamilton spells it, *fazoolee*, which expression is defined by Richardson to mean a person "busying himself in things not belonging to him, or acting without authority." With the effect of the acts of a *fazûli* their Lordships will deal presently. Before doing so, they wish to refer briefly to the state of the decisions in the Indian Courts.

The Calcutta High Court, in sustaining transactions entered into by *de facto* guardians, has proceeded mainly on considerations of necessity for and benefit to the infant. The other High Courts, generally speaking, have cut the Gordian knot by holding that all such dealings with a minor's property were void.

Their Lordships do not feel called upon to examine in detail either set of decisions. But the last case on the subject in the Madras High Court requires their careful and respectful consideration [*Ayderman Kutti* v. *Syed Ali*, (1)]. In their judgment in this case the learned Judges have examined the law at considerable length and their decision appears to divide itself into

(1) (1912) I. L. R. 37 Mad. 514.

1918

IMAMBANDI v. MUTSADDI.

three broad propositions: *first*, that as regards the powers of guardians, *de jure* as well as *de facto*, the Mahomedan law recognises no distinction as to the nature or kind of property, viz., whether it is immovable or movable; *secondly*, that in substance the powers of an unauthorised person who has charge of an infant are co-extensive with those of a lawfully constituted guardian, except in so far that the acts of the former are subject to considerations of necessity or benefit to the infant; and, *thirdly* (and this seems to form the essence of the judgment), that dealings by "a *de facto* guardian" are neither void nor voidable, but are "suspended" until the minor on attaining majority exercises his option of either ratifying the transaction or disavowing it.

With regard to the first of the above propositions, their Lordships have already indicated their views. In their opinion, the Mahomedan law, for obvious reasons, makes a distinction, and a sharp distinction, between "goods and chattels" (*māta'*) and immovable property (*a'kâr*) with regard to the powers of dealing by guardians.

The second proposition, speaking with respect, appears to their Lordships to lose sight of the fact that the acts of *de jure* guardians also are subject to the conditions of necessity for or benefit to the infant. So that upon the reasoning of the Madras judgment, the powers of "a *de facto* guardian" would, to all intents and purposes, be co-extensive with those of a *de jure* guardian. This conclusion would wipe out one of the most important safeguards provided by the Mahomedan law for the protection of the interests of infants. The learned Judges say that:—

"The law as regards the effect of dealings with a minor's property by a *de facto* guardian otherwise than in a case of absolute necessity or clear advantage to the minor is but a corollary of the general rule relating to

salisly [*sic*], a person professing to deal with another's property, but without having legal authority to do so, *i.e.*, by a *fazûli*, as he is technically called; such sales generally are treated as *mauquf*, or dependent."

Then, after referring to various authorities, they continue as follows:—

"The result of the above discussion is that, according to Mahomedan jurists, in cases of urgent and imperative necessity, such as those mentioned, the *de facto* guardian can alienate the property of the minor, no distinction being made between movable and immovable property.'

It would have been an advantage to their Lordships if they had been placed in a position to judge for themselves, on the actual texts, the meaning of the Arabian text-writers and commentators. However, the *Hedâyah* and the *Fatâwai-Alamgiri* are recognised as standard authorities in India on the Hanafi branch of the Sunni Law. Of the *Hedâyah* there is a rendering in English made by Mr. Hamilton under the orders of Warren Hastings; and a large part of the *Fatâwai-Alamgiri* has been paraphrased into English by Mr. Neil Baillie, which is commonly known as Baillie's "Digest" (Hanafia Law). Both Mr. Hamilton and Mr. Neil Baillie in their renderings have, with the object of elucidation, occasionally added phrases which do not exist in the original, but on the whole the English versions of the *Hedâyah* and of the *Fatâwai-Alamgiri* are valuable works on Mahomedan Law.

The subject of sales by unauthorised persons is treated in the *Hedâyah* in a separate section entitled "of Fazoolee Beea,* or the sale of the property of another without his consent" (Book XVI, Vol. II, p. 508). It says:—

"If a person were to sell the property of another without his order the contract is complete, but it remains with the proprietor either to confirm or dissolve the sale as he pleases. Shafei is of opinion that the contract, in this case, is not complete, because it has not issued from a lawful

* Correctly, 'Bai'.

1918

IMAMBANDI v. MUTSADDI.

authority, for that is constituted only by property or permission, neither of which exist in this case."

It then proceeds to give the arguments of the Hanafi doctors in support of their view that the unauthorised contract is "complete." And then it adds:—

"If the proprietor should die, then the consent of the heirs is of no efficacy in the confirmation of the Fazoolee sale, in either case, that is, whether the price have been stipulated in *money* or in *goods*; because the contract rested entirely on the personal assent of the deceased."

In other words, the so-called sale remains wholly ineffective until it receives the "confirmation" of the owner, to whom alone belongs the power of "confirming" it. If he dies before he has "confirmed" it, the transaction falls to the ground, as the right to adopt the *fazûli's* act does not pass to his heirs.

In the *Fatâwai Alamgiri*† the subject is treated under the designation of "dependent sales" (Vol. III, p. 245; Baillie's "Mahommedan Law of Sale," pp. 218-219):—

"When a person sells the property of another, the sale is suspended, according to us [*i.e.*, the Hanafis], for the sanction or ratification of the proprietor; and the existence of both the parties to the contract, and of the subject of sale, is a necessary condition to the validity of his sanction . . . . .

"If the owner should die before sanctioning the sale, sanction by his heir would not suffice to give it operation. Sanction by an owner himself renders a sale operative."

The word in the above passage translated as "suspended" is derived from the same root as the word that has been translated in the heading as "dependent," and in this connection really means "is dependent upon'; also the words "or ratification" have been introduced by Mr. Baillie by way of explanation. The word *ijâzat* in the original is rightly rendered into "sanction."

† The "Book on Sale" in the *Fatawai Alamgiri* has been rendered into English by Mr. Baillie under the name of the "Mahommedan Law of Sale."

The *Majma'-ul-Anhar* states the rule relating to a sale by a *fazûli* in similar terms; it says in substance that such a sale is "established" (takes effect) on the sanction of the *mâlik* (owner), subject to four conditions, which it specifies. And then it adds significantly that according to Shafei (the founder of the second great Sunni school of law) all dealings by an unauthorised person are absolutely void (*bâtil*); Vol. II, p. 88.

In their Lordships' opinion, the Hanafi doctrine relating to a sale by an unauthorised person remaining dependent on the sanction of the owner refers to a case where such owner is *sui juris*, possessed of the capacity to give the necessary sanction and to make the transaction operative. They do not find any reference in these doctrines relating to *fazûli* sales so far as they appear in the *Hedâya* or the *Fatâwai Alamgiri*, to dealings with the property of minors by persons who happen to have charge of the infants and their property—in other words, the "*de facto* guardians."

The Hanafi doctrine about *fazûli* sales appears clearly to be based on the analogy of an agent who acts in a particular matter without authority, but whose act is subsequently adopted or ratified by the principal which has the effect of validating it from its inception. The idea of agency in relation to an infant is as foreign, their Lordships conceive, to Mahomedan Law as to every other system.

In this connection it should be noted that whilst Chapter XII deals exclusively with the effect of "dependent sales," in Chapter XVI the rules relating to the powers of guardians are discussed at considerable length (Baillie's "Mahommedan Law of Sale," p. 243; *Fatâwai Alamgiri*, Vol. III p. 229). The following rule lays down the conditions governing

1918

IMAMBANDI v. MUTSADDI.

sales by the executor (*i.e.*, the appointed guardian) of the immovable property of an infant:—

"And, according to modern decisions, the sale of immovable estate by an executor is lawful only in one of the three cases following: that is, where there is a purchaser willing to give double its value, or the sale is necessary to meet the minor's emergencies, or there are debts of the deceased, and no other means of paying them." (Baillie's "Mahommedan Law of Sale," p. 247; *Fatawai Alamgiri*, Vol. III, p. 233).

Having regard to the object in view, this dictum appears to their Lordships to apply to all forms of property which, like *a'kâr*, combine both security and permanency. But it does not exclude the discretion of the Judge to sanction any alteration of investment in the interests of the infant.

The following case affords a further illustration of the limitations on the powers of "*de facto* guardians":—

"A woman after the death of her husband sells property that belonged to him, supposing herself to be his executrix, and her husband having left *minor* children; she after some time declares that she was not the executrix, her assertion, however, is not to be credited as against the purchaser, but the sale remains in suspense till her children arrive at puberty. If they should admit that she was the executrix, the sale by her is lawful; but if they deny the fact, the sale is void; and though the purchaser should have manured the purchased land, he has no recourse for reimbursement against the woman. What has been said is on the supposition that the woman sues for a cancellation of the sale, on the ground that she was not the executrix; but if the *minor* sue, on that ground, his claim is to be heard." (Baillie, p. 249; *Alamgiri*, Vol. III, p. 234).

The rest of the passage is immaterial for the purposes of this judgment.

The above case shows that even where the mother believes she is vested with authority as her husband's executrix, and in that belief purports to deal with the minor's property, a purchaser let into possession by her is liable to be ejected at the instance of the minor. Her own subsequent denial of authority does not affect the purchaser's position; but if the transaction is

impugned by the rightful owner—viz., the infant—the onus is on the vendee to establish the foundation of his title, that is that his vendor possessed in fact the authority under which she purported to act.

A further rule, which is given in the "Book on Pledges" (Mortgages) (*Kitâb-ur-Rahn*) of the *Fatâwai Alamgiri*, which does not appear to have been translated by Mr. Baillie, is equally explicit. After stating the principle applicable to the powers of the father to pledge or mortgage his minor child's property, it goes on to say: "the mother, if she pledges (mortgages) the property of her infant child, it is not lawful unless she be the executrix [of the father] or be authorised therefor by the guardian of the minor; or the Judge should grant her permission to pledge the infant's property. Then it is lawful; and the right to possession and user is established in the *murtahin* (pledgee or mortgagee) without power of sale;" (*Fatawai Alamgiri*, Vol. V, p. 638).

It seems to their Lordships that the power to sell cannot be wider than the power to mortgage.

For the foregoing considerations, their Lordships are of opinion that under the Mahomedan law a person who has charge of the person or property of a minor without being his legal guardian, and who may, therefore, be conveniently called a "*de facto* guardian," has no power to convey to another any right or interest in immovable property which the transferee can enforce against the infant; nor can such transferee, if let into possession of the property under such unauthorised transfer, resist an action in ejectment on behalf of the infant as a trespasser. It follows that, being himself without title, he cannot seek to recover property in the possession of another equally without title.

1918

IMAMBANDI v. MUTSADDI.

Their Lordships are accordingly of opinion that the decree of the High Court, in so far as it awards to the plaintiffs possession of the shares of the defendants 9 and 10, should be discharged, and, subject to this variation, it should be affirmed and the appeal be dismissed with costs. And their Lordships will humbly advise His Majesty accordingly.

Their Lordships cannot help deprecating the practice which seems to be growing in some of the Indian Courts of referring largely to foreign decisions. However useful in the scientific study of comparative jurisprudence, judgments of Foreign Courts, to which Indian practitioners cannot be expected to have access, based often on considerations and conditions totally differing from those applicable to or prevailing in India, are only likely to confuse the administration of justice.

J. V. W. *Decree varied.*

Solicitors for the appellants: *Truefitt & Francis.*
Solicitor for respondents 1 and 2: *T. L. Wilson.*

APPELLATE CRIMINAL.

Before Chitty and Smither JJ.

LEGAL REMEMBRANCER

v.

MOZAM MOLLA.*

1918

Feb. 20.

Search-warrant—Search-warrant for production of a person confined—Form of warrant—Use of warrant prescribed in Form VIII, Sch. V—Legality of warrant—Criminal Procedure Code (Act V of 1898), s. 100.

It is immaterial what form is used for a search-warrant under s. 100 of the Criminal Procedure Code, provided that the substance of it complies with the requirements of the section.

A search-warrant intended to be issued under s. 100 of the Criminal Procedure Code, and drawn up in accordance with Form VIII, Schedule V, relating to search warrants under s 96, but with alterations adapted to meet the requirements of the former section, is legal

Gurameah v. *King-Emperor* (1) approved.

Bisu Haldar v. *Emperor* (2) distinguished.

ON 8th March, 1917, one Amin Hossein laid an information under s. 366 of the Penal Code before the Sub-Inspector of Mahamadpur thana, to the effect that on the 6th instant, while he was absent from home, Arip Molla, Abdul Rahman and others had forcibly carried away his sister, Sakhina Khatun, from his house. It was alleged that the girl had been married to Abdul Rahman, but that she had on attaining puberty repudiated the marriage and had filed a suit to have it declared void. The Sub-Inspector commenced an enquiry, and went to the house of Arip Molla on

* Government Appeal No. 2 of 1918, against the order of P. E. Cammiade, Sessions Judge of Jessore, dated Sep. 3, 1917.

(1) (1911) 16 C. W. N. 336. (2) (1907) 11 C. W. N. 836.

1918

LEGAL REMEMBRANCER v. MOZAM MOLLA.

the 12th instant. He found the girl there, and it was said that she had cried out for help. He then reported the circumstances to the Inspector of Police, stating that she was being kept in Arip's house in wrongful confinement. The Court Inspector, who was then in charge of the office of the Inspector of Police, submitted the aforesaid report with the first information to the Subdivisional Magistrate who issued a search warrant under s. 100 of the Criminal Procedure Code for the production of the girl in Court, in the following terms:—

"Warrant to search after information of a particular offence.

No. VIII, Sch. V, of Act V of 1898.

S. 100 of the Criminal Procedure Code.

To *Parbutty Churn Dutt, Sub-Inspector of Mahamadpur.*

Whereas a complaint has been made before me of the offence of *the detention of Sakhina Khatun Bibi, sister of Amin Hossein, of Umedpur*, and whereas it has been made to appear to me that the production of *Sakhina* is essential to the inquiry into the said *case of* offence:

This is to authorize and require you to search for the said *Sakhina Khatun in all places of the house of Arip Molla, of Phalsi*, and if found, to produce *her* forthwith before the Court, returning this warrant, with endorsement certifying what you have done under it, immediately on its execution. Given under my hand and the seal of the Court this 12th day of March 1917."

(Sd.) N. K. Sen, *S. D. O.*

The words italicised above were the alterations made in Form VIII by the Subdivisional Officer.

The Sub-Inspector, Parbutty Churn, proceeded to the house of Arip on the same day accompanied with the president panchayat, the daffadar and some police constables. He read out the warrant to Arip and ultimately entered the premises to take the girl. The accused, Israil and others, thereupon, assaulted the members of the police party.

The accused were sent up by the police, and tried by the Subdivisional Officer on charges under ss. 147 and 353 of the Penal Code. Israil was convicted and

sentenced under s. 353 to eight months' rigorous imprisonment. The others were convicted under both sections, and sentenced, under s. 147 only, to six months.

It appeared that the original case of Amin Hossein under s. 366, Penal Code, terminated in the discharge of the accused, after trial, on the 15th April, 1917.

On appeal by the accused, the Sessions Judge of Jessore acquitted all of them by his order, dated 5th September, 1917, upon the authority of *Bisu Haldar* v. *Emperor* (1), holding that case to be conclusive and the facts identical.

The Local Government, thereupon, filed the present appeal against the order of acquittal.

The Deputy Legal Remembrancer (*Mr. Orr*), for the Crown.

Mr. Khuda Bukhsh and *Babu Sailendra Nath Mookerjee*, for the accused.

CHITTY AND SMITHER JJ. In this case the accused persons were convicted by a Deputy Magistrate of offences under sections 353 and 147 of the Indian Penal Code, and sentenced Israil to eight months' and the rest to six months' rigorous imprisonment each. The accused appealed to the Sessions Judge, who acquitted them on a question of law. He held that the ruling in the case of *Bisu Haldar* v. *Emperor* (1) was conclusive in this case. The facts, he said, were identical. Against that acquittal the Government have appealed. It appears clear that the facts of the two cases are not identical. A perusal of the judgment in the case of *Bisu Haldar* v. *Emperor* (1), shows that not only was the warrant in that case issued under section 96 of the Code of Criminal Procedure, but that the terms of the warrant indicated that

(1) (1907) 11 C. W. N. 836.

1918

LEGAL REMEMBRANCER v. MOZAM MOLLA.

it was issued under that section. In this case, there being no prescribed form of warrant under section 100, the Magistrate who issued it adapted a form under section 96 to the provisions of section 100 by altering the figures and also by drawing up the warrant in terms required by section 100. This being so, the warrant would be perfectly legal. For this we find an authority in the case of *Gurameah* v. *King-Emperor* (1). where the form of a warrant under section 98 was used with the necessary alterations for a warrant under section 100. It is immaterial what form is used provided that the substance of the warrant complies with the requirements of section 100. That it certainly did in the case before us. It has been suggested that the warrant was altered after issue to meet the objections raised in this case. Of that there is no evidence whatever on the record; on the contrary, there is the evidence of P. W. No. 12 who states that he altered it with his own hand before the issue. We, accordingly, set aside the order of acquittal passed by the learned Sessions Judge, and remand the case to the Sessions Court for a hearing of the appeal on the merits. The accused may remain on bail pending the hearing of the appeal.

E. H. M. *Case remanded.*

(1) (1911) 16 C. W. N. 336.

PRIVY COUNCIL.

RAJA OF DEO
v.
ABDULLAH.

P.C.*
1918

March 18.

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Title, proof of—Purchase giving right to get a title, but not giving actual title—Benami purchase—Transfer by true owner—Action of father making transfer creating estoppel binding son—Conduct causing change of position in transferee—Onus of proof on person asserting minority of transferer.

The plaintiff (respondent) purchased the village of Badam in the zamindari of the late Raja of Deo, from *R*, a dancing girl, the natural daughter of the Raja, who was the father of the defendant (appellant). In 1886 the Raja's estate being heavily involved in debt, the provisions of the Chota Nagpur Encumbered Estates Act (VI of 1876 as amended by V of 1884) were extended to Deo by a special Act, and a manager was appointed who, acting under the powers given him by the Act, sold the village by public auction, and it was purchased by *K* who, it afterwards appeared, was a *benamidar* for the Raja who provided the purchase money. No conveyance of the village was ever made by the manager to *K*. When the management came to an end in 1896, and the estate was restored to the Raja he caused *L*, the son of *K* (who had died), to execute a conveyance of Badam in favour of *R* in order to benefit her and *M* her mother, *L* merely acting on the command of the Raja. *R* being then a minor put in through *M* a petition for registration and mutation of names, and the Raja himself assisted her, asking that her petition might be granted, and her name be inserted on the register, and stating that he had no objection whatever to that being done, and *R*'s name was accordingly entered on the register as proprietor of the village. In October 1898 the Raja died and, his son being a minor, the estate came under the Court of Wards whose manager in 1899 summarily ejected *R* who was in possession, and conveyed the village to the surviving widow of the deceased Raja as being *gur* property and descendible from Rani to Rani. An application by her for mutation of names was

**Present*: VISCOUNT HALDANE, LORD DUNEDIN, LORD SUMNER, SIR JOHN EDGE AND MR. AMEER ALI.

1918

RAJA OF DEO v. ABDULLAH.

opposed by *R* and rejected. The Rani thereupon filed a suit against *R* and the appellant basing her case on the allegation that *K* was *benamidar* for her. But the Subordinate Judge held that he w s a *benamidar* of the late Raja, and dismissed the suit, a decision which was affirmed by the District Judge. In 1908 *R* executed the conveyance in favour of the plaintiff who brought the present suit against *R* and the appellant for declaration of title and for possession. The defence was a denial of *R's* title to convey, and a denial of her power to do so as being a minor. The Subordinate Judge upheld both defences and dismissed the suit. The High Court reversed that decision and gave the plaintiff a decree.

Held (affirming that decision), that the onus of proving *R's* minority was on the appellant and he had not established his assertion.

Held, also, that the sale by auction, though it gave *K* a right to get a title, did not give him an actual title. Both Courts found that *K* had failed to prove that he was a true purchaser for value. When, therefore, *L* executed the conveyance in favour of *R* the late Raja was the true owner. *K* was a trustee for him, and the trusteeship was all that *L* succeeded to. The late Raja too was proprietor of the estate of which Badam was a part; so that if by renunciation or limitation the right of *K* to get a conveyance became extinct, the full right and title were in the late Raja; and not only did he cause *L* to execute the conveyance, but he actually assisted *R* to get registration of her name as owner. By so doing he caused her to change her position, for by such registration she became bound to the Government for all the liabilities attaching to the registered holders of immoveable property. If the late Raja had lived and attempted to regain the property that conduct would have estopped him from doing so. The appellant was his son, and succeeded by gratuitous title, and he could not, therefore, do what his father would have been unable to do.

APPEAL 94 of 1916 from a judgment and decree (10th June 1913) of the High Court at Calcutta, which reversed a judgment and decree (6th July 1909) of the Subordinate Judge of Gaya.

The defendant was the appellant to His Majesty in Council.

The suit which gave rise to this appeal related to a village called Badam in Mahal Umga Nugunnah Charkawan in the district of Gaya, which belonged to the late Raja of Deo, Raja Bhikam Narain Singh Bahadur. The Raja's estate being, in 1886, heavily

encumbered, the Government of India passed Act IX of that year by which the provisions of the Chota Nagpur Encumbered Estates Act (VI of 1876 as amended by Act V of 1884) were extended to it and a manager was appointed under the Act. In January 1888 the manager sold the village of Badam by auction to one Kashinath Singh, but it was found by both the lower Courts that Kashinath Singh, who was a *moosahib* of the Raja, was only a *benamidar* in the transaction and that the real purchaser was the Raja himself. No conveyance of any kind was executed by the manager in connection with the sale.

In 1896 the estate was restored by Government to the Raja, who in 1897 was desirous of making some provision for his natural daughter (Rajeshwari Koer, the third respondent) by his mistress, one Munni Bibi; and the *benamidar*, Kashinath Singh, having then died leaving an adopted son, Lajjadhari, gave directions to the latter who, on 27th August 1897, conveyed the village Badam by a deed of gift to Rajeshwari and her name was then, at the instance and express consent of the Raja, entered in the Government registers as owner in the place of his own, and she thereupon took possession of the village.

In October 1898 the Raja died leaving the appellant (Rajkumar Jagannath Prashad Singh, then a minor) his sole heir, and the estate thereupon came under the Court of Wards, the manager under the Court, acting on behalf of the appellant, dispossessed Rajeshwari Koer from the village, and by a sale deed, dated 26th January 1901, purported to convey the appellant's interest therein to his mother, Rani Chandradeo Koer, the second respondent. She in 1902 applied to have her name registered as proprietor in place of Rajeshwari in the Government records, but her application was dismissed, whereupon she instituted a suit

1918

RAJA OF DEO v. ABDULLAH.

(40 of 1904) in the Court of the Subordinate Judge of Gaya against Rajeshwari and the present appellant in which she claimed to be entitled to the village of Badam under an alleged custom by which certain of the Raj properties were held by the Ranis of Deo for their lives; and also by reason of the conveyance, from the appellant, of 26th January 1901.

That suit was contested by Rajeshwari who denied the title of Rani Chandradeo, and claimed the village under the conveyance of 27th August 1897, and also by estoppel in so far as the Rani's claim was derived from the appellant as heir of the Raja. The suit was dismissed by the Subordinate Judge who held the claim under the custom alleged to be not maintainable; that the Raja and his heir, the appellant, were both estopped from denying Rajeshwari's title; and that the conveyance of 1901 did not create any title in favour of Rani Chandradeo. An appeal by her to the District Judge was also dismissed.

On 24th February 1908 Rajeshwari conveyed the village to Syed Abdullah, the first respondent, who being unable to get possession of it from the manager of the Court of Wards instituted the suit out of which the present appeal arose, on 30th June 1908. He made defendants the appellant, Rani Chandradeo, and Rajeshwari, and prayed for a declaration that he was the owner of the village, for possession, and other relief.

Rajeshwari supported his title; but the appellant and Chandradeo denied his claim, and asserted that the appellant was owner of the property in suit.

The Subordinate Judge, as to the effect of the judgment in the former suit, held that there was an estoppel as to certain points now undisputed, but said nothing as to an estoppel on the appellant as heir of the Raja; that on the evidence Rajeshwari was a minor at the time of the suit, and that her contract conveying the

village to Syed Abdullah was therefore void; that the conveyance by Lajjadhari Singh conferred no title on Rajeshwari; that the Raja put Rajeshwari in possession without divesting himself of the title, and no title passed to her thereby; and on the question whether under section 41 of the Transfer of Property Act, Rajeshwari having been placed by the Raja in the position of ostensible owner could make a valid transfer to Syed Abdullah, he held that as at the time of the transfer Rajeshwari was not in possession and Syed Abdullah had full knowledge of all the facts, the latter could not be said to have acted in good faith. He accordingly dismissed the suit.

On appeal by Syed Abdullah to the High Court (N. R. CHATTERJEA AND NEWBOULD JJ.), that Court held that the appellant had failed to prove that Rajeshwari was a minor at the date of her conveyance to Syed Abdullah; that whatever might be the effect of Lajjadhari's conveyance to Rajeshwari there was no doubt that the Raja fully intended to make a complete transfer of the village to her; that a conveyance was not essential to bind him, the principle of estoppel only depending on the acts and representations of the real owner; that even if he could have challenged Rajeshwari's title on the ground that she was not a purchaser for value, he could not challenge the title of a *bonâ fide* purchaser from her (as they held Syed Abdullah was), and that the appellant was in no better position; that Syed Abdullah was entitled to make a new case of estoppel by conduct though not raised in his pleadings on the ground that the issues were wide enough to include it; and that his title, both by estoppel and under section 41 of the Transfer of Property Act, could not be impeached by the defendants.

The decree of the Subordinate Judge was accordingly set aside, and the suit was decreed.

1918

RAJA OF DEO v. ABDULLAH.

On this appeal,

A. M. Dunne, *K. C.*, and *T. B. W. Ramsay*, for the appellant, contended that Syed Abdullah, the first respondent, had failed to establish any title to the village in suit. Kashinath, who was merely a *benamidar* for the Raja Bhikham Narayan Singh, took no title to it by the sale to him. No conveyance of any kind was executed in his favour by the manager in connection with the sale. For him to acquire a title, a registered transfer was essential under section 54 of the Transfer of Property Act, which expressly excludes any equitable title arising from contract. Kashinath having acquired no title Rajeshwari could acquire none through him from Lajjadhari. The plaintiff-respondent's case was not in the lower Courts based upon a gift to Rajeshwari from Raja Bhikham, whose title on the contrary was denied, and no issue was framed as to the transfer to her by Lajjadhari being a gift. In fact no title by gift to her would be valid in the absence of a registered transfer signed by the Raja as required by section 123 of the Transfer of Property Act. A transfer of possession would not be sufficient as between Hindus. Nor did the plaintiff-respondent make any such reasonable enquiries as would make section 41 of that Act applicable to the transaction. Rajeshwari did not change her position by acting on any representation made by Raja Bhikham so as to create a title by estoppel. Reference was made to section 115 of the Evidence Act, and *Sarat Chandra Dey* v. *Gopal Chander Laha* (1): that was clearly a case of change of position resulting from a representation; but no estoppel could arise in Rajeshwari's favour in the present case. No doubt she became liable for the revenue to Government, but that was not sufficient to create such a title by

(1) (1892) I. L. R. 20 Calc. 296; L. R. 19 I. A. 203.

estoppel. Moreover, in any case the evidence showed that Rajeshwari was a minor at the date of the transfer by her to the plaintiff-respondent, and no title in the village passed to him. Transfer of Property Act, section 7, and Evidence Act, section 11, were referred to. The decree of the Subordinate Judge was right.

Sir William Garth, for the plaintiff-respondent, was not called upon.

March 18.

The judgment of their Lordships was delivered by LORD DUNEDIN. In this suit Syed Abdullah sues the Raja of Deo for possession of a village called Badam. The plaintiff is purchaser from a dancing girl, Rajeshwari Koer, who is the natural daughter of the late Raja Bhikham of Deo, father of the present Raja, defendant.

The history of the matter is this: Raja Bhikham having got into involved circumstances, his estate was put under management under the provisions of the Chota Nagpur Encumbered Estates Act, which had been made to apply to Deo by a special Act. The manager appointed under the Act one Bhuan Lal, who had, in terms of the Act, powers of sale, put up to public auction the village of Badam. It was bought by Kashinath Singh for the sum of 2,000 rupees. As a matter of fact, Kashinath had been put forward by the Raja himself, who provided him with the money. No conveyance was executed by Bhuan Lal in favour of Kashinath. The management came to an end in 1896, and the Raja was restored to his estate. In 1897, the Raja, who had expressed his desire to benefit Munni Bibi, the mother of Rajeshwari, and his infant daughter by her, caused Lajjadhari, the adopted son of Kashinath who had by this time died, to execute a conveyance of Badam in favour of Rajeshwari. The

1918

RAJA OF DEO v. ABDULLAH.

deed of conveyance bore to be in respect of a consideration of 5,000 rupees, but in reality no money passed—Lajjadhari merely acted on the command of the Raja. On the 22nd April, 1898, Rajeshwari, being a minor, applied through her mother as guardian for registration and mutation of names in respect of the village of Badam. On the same day the Raja presented a petition in which he narrated the fact of Badam having been sold by Bhuan Lal, the manager, set forth that Kashinath had died without having obtained a conveyance and that Lajjadhari, his son, had sold the property to Rajeshwari, and prayed that Rajeshwari's petition should be granted and her name inserted in the register, "to which your petitioner has no objection whatever." Rajeshwari's name was accordingly entered in the Government register as proprietrix of the village of Badam.

In October 1898 Raja Bhikham died and the present Raja being a minor the estate came under the management of the Court of Wards. Sometime in 1899 Mr. Wright, the manager, turned out Rajeshwari who was in possession, *via facti* and without process. In 1901 Mr. Wright conveyed Badam to Rani Chandra Koer, the surviving widow of Raja Bhikham, on the idea that it was *gur* property descending from Rani to Rani. In 1902 the Rani applied for mutation of names. Her application was opposed by Rajeshwari and was refused. In 1904 the Rani raised a civil suit for a declaration that the property was hers. To this suit she called as defendants Rajeshwari and the young Raja, the present defendant. The whole facts were gone into. The Rani had based her case on an allegation that Kashinath was a *benamidar* for her. The Subordinate Judge held that Kashinath was the *benamidar* of Raja Bhikham, and not of the Rani, and dismissed the suit, adding an opinion the Raja

Bhikham himself would have been estopped from denying that the property belonged to Rajeshwari. On appeal the District Court affirmed the judgment, but did not repeat the dictum as to estoppel. In 1908 Rajeshwari executed a conveyance in favour of the present plaintiff, who in the same year raised the present suit.

The defence to the suit was, after discounting irrelevant pleas, based on two grounds, first, a denial of Rajeshwari's title to convey anything to the plaintiff; second, a denial that Rajeshwari had conveyed to the plaintiff on the allegation that she was a minor at the time of the conveyance. The learned Subordinate Judge upheld both defences and dismissed the suit. The Appeal Court reversed and gave judgment in favour of the plaintiff.

It will be convenient to dispose of the second ground of defence first, as it depends on a pure question of fact. The Subordinate Judge, while commenting on the unreliability of the witnesses, three in number, adduced by the defendant to prove the minority, gave judgment on the ground that the rebutting evidence was not what it might have been. The High Court agreeing with the criticism on the defendant's witnesses, came to the conclusion that the defendant had not made out his allegation. Their Lordships agree with the High Court. The onus to prove minority is on the defendant who asserts it. He brings no reliable evidence to prove this assertion. This defect in his proof cannot, their Lordships think, be cured by a mere criticism of the evidence brought by the plaintiff. It would further seem to their Lordships that the evidence tendered by the brother is not open to any obvious objection. But it is enough to say that the matter being left in doubt the defendant fails to prove his assertion.

1918

RAJA OF DEO v. ABDULLAH.

The sole question then is whether there was a title in Rajeshwari. Formal title by progress there was not. Both Courts find that the sale by auction, though it gave a right to the purchaser to get a title, did not give him an actual title. Admittedly, Kashinath never got the actual title, to which as purchaser he was entitled. The plaintiff in the Court below attempted to prove that Kashinath was a true purchaser for value. In this he failed, and both Courts are agreed as to this. He was only trustee for the Raja Bhikham. The argument in the lower Court then turned mostly on the effect of the judgments of 1905 and 1906 in the suit by the Rani. The plaintiff urged that as between Raja Bhikham and the defendant, who were both co-defendants to the Rani's suit, these judgments formed a *res judicata* to the effect that the property belonged to Rajeshwari. In deciding—rightly—that this was not so, the learned Subordinate Judge overlooked the fact that, though the dictum of the Subordinate Judge in the Rani's suit that Raja Bhikham was in a question with Rajeshwari estopped from denying that the property was hers was an *obiter dictum*, yet on the emergence of the same facts as were found in that suit, the question arose to be decided in this suit, it being obvious that if Raja Bhikham was estopped, the present Raja, his son, taking by gratuitous title from him, was equally estopped. But the High Court took up that point and decided it in favour of the plaintiff. The question before their Lordships is whether that view was right.

Their Lordships think that it was. In the first place, they are satisfied that the facts are as have been stated above. When, therefore, Lajjadhari executed the conveyance in favour of Rajeshwari at the instance of Raja Bhikham, he (Raja Bhikham) was the true owner. Kashinath was a trustee for Raja Bhikham,

and Lajjadhari could only succeed to his father's trusteeship. Further, Raja Bhikham was the proprietor of the estate of which Badam was a part. So that if by renunciation or limitation the right of Kashinath to get a conveyance became extinct, the full right as well as the title was in him. In this position of affairs, not only did Raja Bhikham cause Lajjadhari to execute the conveyance, but when Rajeshwari proceeded to give effect to that conveyance by applying for registration he actively assisted her. By so doing he caused her to change her position, for by registration she became bound for all the State liabilities which attach to the registered holders of immovable property. If then Raja Bhikham had lived and attempted to regain the property these actings of his would, in their Lordships' view, have estopped him from making the claim. He did not do so. The present defendant is his son, and succeeded by gratuitous title, and he therefore cannot do what his father would have been unable to do.

Their Lordships will humbly advise His Majesty o dismiss the appeal with costs.

Appeal dismissed.

Solicitors for the appellant: *T. L. Wilson & Co.*
Solicitor for the respondent: *Edward Dalgado.*

J. V. W.

LETTERS PATENT APPEAL.

Before Mookerjee and Walmsley JJ.

1917

July 3.

SURENDRA NATH GHOSE

v.

KALI GOPAL MAZUMDAR.*

Ex parte Decree—Collusion—Land purchased in execution—Suit for possession—Utilisation of Courts for creation of fictitious titles, whether permissible—Benamidar's right to sue.

Where A sued his widowed sister B collusively for money alleged to have been advanced to her husband, and obtained an *ex parte* decree, and in execution thereof purchased B's property also collusively at a sale held by the Court, and thereafter instituted a suit for recovery of possession on establishment of title :

Held, that Courts of Justice should not be permitted to be utilised for the purpose of creating fictitious titles, which must inevitably tend to weaken the sanctity which justly attaches to judicial transactions. It was open to a party to impeach the reality of a transaction between two private individuals and equally open to him to impeach the reality of a judicial proceeding.

Held, also, that in suits for land an action could not be maintained by a *benamidar*.

Bandon v. *Becher* (1), *Atrabannessa Bibi* v. *Safatullah Mia* (2) followed.

Rambehari Sarkar v. *Surendra Nath Ghose* (3), *Hari Gobind Adhikari* v. *Akhoy Kumar Mozumdar* (4), *Mohendra Nath Mookerjee* v. *Kali Proshad Johuri* (5) referred to.

Ram Bhurosee Singh v. *Bissesser Narain Mahata* (6) dissented from.

APPEALS by the plaintiff and the defendant, under cl. 15 of the Letters Patent, from the judgment of Roe J.

* Letters Patent Appeals Nos 18 and 22 of 1916, in Special Appeal No. 570 of 1914.

(1) (1835) 3 Cl. & Fin. 479, 511.
(2) (1915) 22 C. L. J. 259.
(3) (1913) 19 C. L. J. 34.
(4) (1889) I. L. R. 16 Calc. 364.
(5) (1902) I. L. R. 30 Calc. 265.
(6) (1872) 18 W. R. 454.

1917

SURENDRA NATH GHOSE v. KALI GOPAL MAZUMDAR.

The facts are shortly these. These appeals arose out of a suit for recovery of possession of land on establishment of title. The plaintiff contended that the disputed property was included in his estate, which originally belonged to his sister Kadambini's husband. The plaintiff sued her for recovery of money due from her husband and obtained an *ex parte* decree in execution whereof he purchased the property at a sale held by the Court. The defendant, on the other hand, pleaded that the plaintiff had no title to the estate mentioned, as the proceedings against his sister were collusive and fraudulent. Further, that the disputed property was included within the estate of the defendant and not within that of the plaintiff. The Court of first instance decreed the suit. On appeal, the lower Appellate Court reversed the decision of the Court below and dismissed the suit, holding that as the proceedings taken by the plaintiff against his sister were collusive and fraudulent, the plaintiff did not acquire any title to the property in dispute. Thereupon, the plaintiff preferred a second appeal to the High Court. On the 21st December 1915, Roe J. (sitting singly) reversed the decision of the lower Appellate Court holding that a *benamidar* could bring a suit for land and remanded the case for retrial upon the question whether the disputed land was comprised within the estate claimed by the plaintiff or that owned by the defendant. From that decision both the plaintiff and the defendant preferred these appeals under the Letters Patent.

Babu Surendra Chandra Sen, for the appellant in No. 18 and for the respondent in No. 22.

Babu Jogesh Chandra Roy, *Babu Biraj Mohan Majumdar* and *Babu Surendra Nath Das Gupta*, for the respondent in No. 18 and for the appellant in No. 22.

1917

SURENDRA NATH GHOSE v. KALI GOPAL MAZUMDAR.

MOOKERJEE AND WALMSLEY JJ. These appeals have been preferred under clause 15 of the Letters Patent against a judgment of Mr. Justice Roe in a suit for recovery of possession of land on establishment of title. The case for the plaintiff is that the property in dispute is comprised within his estate, which originally belonged to the husband of his sister Kadambini, that he sued her for recovery of the money due from her husband, that he obtained a decree and that in execution thereof he purchased the property at a sale held by the Court. The case for the defendant is, that the plaintiff has no title to the estate mentioned, because the proceedings against his sister were collusive and fraudulent. The defendant further pleads that the disputed land is comprised within his estate and not within the estate claimed by the plaintiff. The trial Court found against the defendant and decreed the suit. Upon appeal, the Subordinate Judge reversed that decision and dismissed the suit. He held that as the proceedings, taken by the plaintiff against his sister, were fraudulent and collusive, he had not acquired title to the disputed property. Upon appeal to this Court, Mr. Justice Roe has reversed the decision of the Subordinate Judge and has remanded the case for retrial upon the question, whether the disputed land is comprised within the estate claimed by the plaintiff or that owned by the defendant. He has held, upon the authority of the decision in *Ram Bhurosee Singh* v. *Bissesser Narain Mahata* (1), that the plaintiff is entitled to maintain this suit, although the proceedings taken by him against his sister may have been collusive. The plaintiff and defendant are both dissatisfied with the order of remand. The defendant has accordingly appealed on the ground that, on the facts found, the plaintiff has acquired no title and

(1) (1872) 18 W. R. 454.

is not competent to maintain this action. The plaintiff has, on the other hand, appealed on the ground that the order of remand is unnecessary, as, upon the facts found, a decree should have been made in his favour on the merits. We must consider the appeal of the defendant (L.P.A. 18 of 1916) first, because if his contention is well founded, the suit must be dismissed.

The argument of the defendant is based upon the findings of the Subordinate Judge as to the unreality of the proceedings taken by the plaintiff against his sister. The plaintiff, no doubt, sued his sister for recovery of money alleged to have been advanced to her husband. But the Subordinate Judge has found that there was no foundation for this claim, as there was in reality no debt due to the plaintiff from his brother-in-law. Consequently, the suit instituted by the plaintiff against his sister was based upon an imaginary claim. There was no defence to that action and an *ex parte* decree was made. That decree was nominally put into execution. A collusive sale was held and title was supposed to have passed to the plaintiff from his sister by virtue of the proceedings taken in Court. The defendant urges that, in these circumstances, the plaintiff acquired no title whatsoever to the property of his sister. We are of opinion that this contention is well founded.

Suits of this character are not altogether unknown, and their effect is vividly described by Lord Brougham in a celebrated passage in the judgment of the House of Lords in *Bandon* v. *Becher* (1). "A sentence is a judicial determination of a cause agitated between real parties, upon which a real interest has been settled; in order to make a sentence, there must be a

(1) (1835) 3 Cl. & Fin. 479, 511.

1917

SURENDRA NATH GHOSE v. KALI GOPAL MAZUMDAR.

real interest, a real argument, a real prosecution, a real defence, a real decision. Of all these requisites, not one takes place in the case of a fraudulent and collusive suit; there is no Judge, but a person, invested with the ensigns of a judicial office, is mis-employed in listening to a fictitious cause proposed to him; there is no party litigating, there is no party defendant, no real interest brought into question. The whole proceeding is collusive and fraudulent. It cannot, therefore, be treated as a judicial proceeding, but may be passed by as availing nothing to the party who sets it up." But the plaintiff respondent contends that as the decision in this litigation would be operative as against the real owner [*Rambehari Sarkar* v. *Surendra Nath Ghose* (1)], the suit should be allowed to proceed at his instance. We are emphatically of opinion that we should not accede to this argument. Courts of Justice should not be permitted to be utilised for the purpose of creating fictitious titles, which must inevitably tend to weaken the sanctity which justly attaches to judicial transactions. It is no doubt open to a party to impeach the reality of a transaction between two private individuals; it is equally open to him to impeach the reality of a judicial proceeding. But the Court should certainly be slow to encourage the creation of fictitious titles in the manner disclosed by the proceedings placed before us.

Reference was made to the decision of Sir Richard Couch C. J. in *Ram Bhurosee Singh* v. *Bissesser Narain Mahata* (2), where a suit for possession of land by a *benamidar* was allowed to be maintained. That decision, however, is not in conformity with a long series of cases in this Court, both anterior and subsequent to it, which will be found reviewed in

(1) (1913) 19 C. L. J. 34.

(2) (1872) 18 W. R. 454.

Hari Gobind Adhikari v. *Akhoy Kumar Mozumdar* (1) and *Mohendra Nath Mookerjee* v. *Kali Proshad Johuri* (2). We must take it now as settled in this Court that, in suits for land, an action cannot be maintained by a *benamidar*: *Atrabannessa Bibi* v. *Safatullah Mia* (3). But in our opinion, the case now before us, is much stronger than any of the cases just mentioned. This is a suit by a person who has deliberately sought to utilize the machinery of the Courts for a purpose for which Courts of Justice do not exist, viz., for the purpose of creation of fictitious titles, and we fail to appreciate how a Court can be invited, by a person who has so acted, to recognise and enforce such an unreal title. Considerations which may be applicable to *bona fide* purchasers clearly do not arise here: *Radha Madhab* v. *Kalpataru* (4), *Akhil* v. *Monmotha* (5), *Gore* v. *Stacpoole* (6).

It has finally been suggested that we should direct that the real owner be joined as a plaintiff in the suit. No doubt, a step of this character has been commended in some of the cases found in the books [*Sitanath Shaha* v. *Nobin Chunder Roy* (7), *Bhobo Soondree Dasseah* v. *Issur Chunder Dutt* (8) and *Bhola Pershad* v *Ram Lall* (9)], but the course has not been adopted in others: *Hari Gobind Adhikari* v. *Akhoy Kumar Mozumdar* (1). It is obvious that the real owner here could not be joined as a party, except upon an application by herself. But even if such an application were made, we could not possibly grant it, because if the application were granted, the allegations in the plaint would require to be completely recast.

(1) (1889) I. L. R. 16 Calc. 364.
(2) (1902) I. L. R. 30 Calc. 265.
(3) (1915) 22 C. L. J. 259.
(4) (1912) 17 C. L. J. 209.
(5) (1913) 18 C. L. J. 616.
(6) (1813) Dow H. L. C. 18, 30.
(7) (1879) 5 C. L. R. 102.
(8) (1872) 11 B. L. R. 36.
(9) (1896) I. L. R. 24 Calc. 34.

1917

SURENDRA NATH GHOSE v. KALI GOPAL MAZUMDAR.

It has further been stated to us that the suit by the real owner, if instituted now, will be in time; consequently, there is no substantial reason why we should grant this belated application for addition of the real owner, contrary to the allegations in the plaint and the evidence.

The result is that the appeal preferred by the defendant (L. P. A. 18 of 1916) is allowed, and that by the plaintiff (L. P. A. 22 of 1916) is dismissed. The suit will stand dismissed with costs in all the Courts; but there will be no separate order for costs in the appeal by the plaintiff.

L. R. *Appeal by defendant allowed.*
Appeal by plaintiff dismissed.

APPELLATE CIVIL.

Before Mookerjee and Beachcroft JJ.

1917

Aug. 22.

BANDIRAM MOOKERJEE

v.

PURNA CHANDRA ROY.*

Jurisdiction—Execution proceedings—Suits above Rs. 5,000—Appeal from order in execution proceedings—Civil Courts Act (XII of 1887), s. 21, sub-s. (1)—Civil Procedure Code (Act V of 1908), ss. 99, 100, 108.

Where, in execution proceedings in a mortgage suit the value of which exceeded Rs. 5,000, an order was made by the Court of first instance which on appeal was modified by the District Judge:

Held, that the order of the District Judge was made without jurisdiction and was contrary to law. In such a suit, an appeal against an order

* Appeal from Order, No. 1 of 1917, against the Order of G. B. Mumford, District Judge of Birbhum, dated Sep. 19, 1916, modifying the order of N. N. Chatterjee, Subordinate Judge of Birbhum, dated July 26, 1916.

made in a proceeding arising out of the decree lay to the High Court and not to the Court of the District Judge under the provisions of s. 2, sub-s. (*1*) of the Bengal Civil Courts Act, 1887.

Held, also, that as the order was passed on appeal by the District Judge, a second appeal lay to the High Court under s. 100 of the Civil Procedure Code, 1908.

Ranjit Misser v. *Ramudar Singh* (1) referred to.

APPEAL by Bandiram Mookerjee.

In certain execution proceedings which arose out of a suit for mortgage, the value of which exceeded Rs. 5,000, the second mortgagee decree-holder applied to the Court of first instance objecting to the interest claimed by the first mortgagee. The said Court on the 27th July 1916, allowed the objection and held that the first mortgagee was entitled to interest only up to a certain date.

From this order the first mortgagee appealed to the District Judge. The latter, on the 19th September 1916, modified the said order. From that decision the second mortgagee preferred this appeal to the High Court.

Babu Bipin Behari Ghose (junior) and *Babu Sarat Chandra Dey*, for the appellant.

Babu Jitendra Lal Banerjee, for the respondent.

MOOKERJEE J. This is an appeal from an appellate order passed in execution proceedings on the basis of a decree in a mortgage suit which was valued at above Rs. 5,000. The order of the District Judge, which modifies the order of the Subordinate Judge, is challenged on the ground that the appeal from the order of the Subordinate Judge lay to this Court and not to the District Judge. This contention is clearly well-founded.

(1) (1911) 16 C. L. J. 77.

1917

BANDIRAM MOOKERJEE v. PURNA CHANDRA ROY.

MOOKERJEE J.

Section 21, sub-section (*1*) of the Bengal Civil Courts Act (XII of 1887) provides that an appeal from a decree or order of a Subordinate Judge shall lie to the District Judge, where the value of the original suit in which, or in proceedings arising out of which, the decree or order was made does not exceed Rs. 5,000 and to the High Court in any other case. In the case before us, the value of the original suit exceeds Rs. 5,000. Consequently, an appeal against an order made in a proceeding arising out of the decree in the suit lies to this Court, and not to the Court of the District Judge. The order of the District Judge was consequently made without jurisdiction. The question thus arises, whether this Court is competent to reverse that order in the exercise of appellate jurisdiction.

There can be no question that the order of the District Judge made under section 47, is a decree within the meaning of section 2 of the Civil Procedure Code. As the order was passed in appeal, a second appeal lies to this Court under section 100, provided the reason assigned in support of it, namely, that the District Judge acted without jurisdiction, falls within the scope of one or other of the three clauses of sub-section (*1*) of that section. The decision of the District Judge is, in our opinion, contrary to law; for although he does not explicitly state that he was competent to hear the appeal which had been preferred to him contrary to the provision of section 21 of the Bengal Civil Courts Act, yet his decision necessarily implies that he had jurisdiction to entertain the appeal; it is an elementary rule that no Court can entertain an appeal which it is not expressly authorised by law to hear. We must hold accordingly that the decision of the District Judge is contrary to law, because passed without jurisdiction, and must be set

aside by this Court under section 100 of the Civil Procedure Code. This view is in conformity with the principle recognised in *Ranjit Misser* v. *Ramudar Singh* (1), namely, that when a decree has been made without jurisdiction, an appeal lies against it precisely in the same manner as if it had been made with jurisdiction. This doctrine has been repeatedly affirmed in a long line of cases: *Abdul Hossein* v. *Kasi Saha* (2), *Kalipada* v. *Shekhar Basini* (3), *Jwala Prasad* v. *Salig Ram* (4) and *Perumal* v. *Rajagopala* (5). This view is also supported by the terms of section 99 of the Civil Procedure Code, which applies to appeals from appellate decrees by virtue of section 108.

The result is that this appeal is allowed, the order of the District Judge set aside, and that of the Subordinate Judge restored. We do not, however, express any opinion as to the correctness of the order of the Court of first instance.

As the point was not taken in the lower Appellate Court and as the present appeal has not been opposed, there will be no order for costs either here or in the Court of Appeal below.

BEACHCROFT J. I agree.

L. R. *Appeal allowed.*

(1) (1911) 16 C. L. J. 77.
(2) (1899) I. L. R. 27 Calc. 362.
(3) (1916) 24 C. L. J. 235.
(4) (1891) I. L. R. 13 All. 575.
(5) (1889) I. L. R. 13 Mad. 248.

APPELLATE CIVIL.

Before Teunon and Chapman JJ.

1913

Dec. 22.

HARIHAR PERSAD BAJPAI

v.

AJUB MISIR.*

Landlord and Tenant—Presumption of permanency of rent—Bengal Tenancy Act (VIII of 1885) as amended by Bengal Acts of 1898 and I of 1903, ss. 31A, 50(2), 113 and 115—Effect of ss. 31 and 113 of the Bengal Tenancy Act—Prevailing rate—Ground for enhancement of rent.

Where a Record of Rights has been finally published, in view of s. 115 of the Bengal Tenancy Act the presumption under s. 50 (*2*) of the Act does not arise where the tenants have been recorded as occupancy raiyats and not raiyats holding at fixed rents.

Radha Kishore Manikya v. *Umed Ali* (1) not followed.

Pirthichand Lal Chowdhry v. *Basarat Ali* (2) relied upon.

By enacting s. 31 of the Bengal Tenancy Act the Legislature never intended to alter the pre-existing law in districts to which that section has no application. Where each tenant holds at a different rate there is no prevailing rate.

Even on the ground of prevailing rate, there can be no enhancement of rent for 15 years, under s. 113 of the Bengal Tenancy Act, where rent has been settled under Chapter X of the Act.

THE facts will appear from the judgment of the Court.

Dr. Dwarka Nath Mitter and *Babu Bijoy Kumar Bhattacharyya*, for the plaintiff-appellant.

Babu Akshoy Kumar Banerjee, for the respondent.

* Appeals from Appellate Decrees, Nos. 1917, 2131 to 2134 of 1911, against the decrees of the District Judge of Mozafferpore, dated March 31, 1911, modifying the decrees of the Munsif of Motihari, dated June 20, 1910.

(1) (1908) 12 C. W. N. 904.

(2) (1909) I. L. R. 37 Calc. 30 ; 13 C. W. N. 1149.

TEUNON AND CHAPMAN JJ. These six appeals arise out of four suits for enhancement of rent. The claim to enhancement was based on two grounds, namely, (*i*) that the rate of rent paid was below the prevailing rate; and (*ii*) that there had been a rise in the prices of staple food crops.

In three of the suits the learned District Judge found that in proceedings under Chapter X of the Bengal Tenancy Act, the rent of the holdings had been settled by the Settlement Officer. In these proceedings the Record of Rights was finally published on the 18th of January 1898, and the suits were instituted on the 6th of July 1909. The District Judge, therefore, held that in view of the 15 years' period prescribed in section 113 of the Act the suits must be regarded as premature. In appeal, it is contended that the rents were merely recorded and not settled, and that even if the rents were settled, an enhancement might still be granted on the ground of prevailing rate.

The District Judge's finding that the rents had been settled under Chapter X of the Act was based on the entries in certain *khatians* forming part of the Record of Rights. These *khatians* have been removed from the record by the landlord-appellant and have not been produced before us at the hearing of these appeals. We must, therefore, hold that the District Judge's finding is correct.

The second contention is contrary to the clear provisions of section 113 and cannot be supported. This disposes of the five appeals brought by the landlord and these appeals are, therefore, dismissed with costs.

The remaining Appeal No. 2007 is by the tenants Ajub Misir and others. They contend (*i*) that they should have been found to be raiyats holding at a fixed rent; and (*ii*) that an enhancement on the ground

1913

HARIHAR PERSAD BAJPAI v. AJUB MISIR.

of prevailing rate, though disallowed in the judgment, has been granted by the decree.

In the Record of Rights, to which reference has already been made, the tenants have admittedly been recorded as occupancy raiyats and not as raiyats holding at fixed rents. The contention before us is that notwithstanding this entry in the Record of Rights (finally published in January 1898), the appellants are entitled in the present suit (instituted in 1909) to the benefit of the presumption arising under section 50 (*2*) of the Act. This contention is based on the case of *Radha Kishore Manikya* v. *Umed Ali* (1), but in view of the plain language of section 115 of the Act, and the decision of the Full Bench in the case of *Pirthichand Lal Chowdhry* v. *Basarat Ali* (2), can no longer be supported.

On the question of prevailing rate the decree is not in accordance with the judgment, but the landlord-respondent contends that the District Judge has erred in holding that in the village in suit there is no prevailing rate. It is conceded that section 31A has not been extended to the local area in question, but the respondent seeks to employ the method therein prescribed, either without modification or with this modification, that he would take as criterion not area but the number of tenants, that is to say, he contends that the rate at or above which more than half the tenants hold should be taken to be the prevailing rate. On this principle he says that in the case of *paddy* lands (spoken of by the Commissioner as A lands) the prevailing rate is Rs. 3-8 or Rs. 3-12, and in the case of the comparatively low or *bethan* lands is Rs. 3-6 or Rs. 4-12. But this contention is opposed to all authority, and we cannot hold that by enacting section 31A, the Legisla-

(1) (1908) 12 C. W. N. 904.

(2) (1909) I. L. R. 37 Calc. 30; 13 C. W. N. 1149.

ture intended to alter in this way the pre-existing law in Districts to which that section has no application. Moreover, if we were to accept the respondent's contention, it does not appear that the materials for ascertaining the prevailing rate are complete or sufficient. The Commissioner's report shows that he has left out of consideration a number of holdings measuring in the aggregate 220 bighas, on the ground that though comprising lands of both classes, they are held at lump rentals. We are unable, however, to accept the landlord's contention, and agree with the District Judge in holding that in this village, where 44 tenants hold A class lands at 44 rates, varying from annas 15 to Rs. 8-9, and 13 tenants hold B class lands at 13 rates rising from Re. 1-11 to Rs. 6-14 a bigha, there is no prevailing rate.

It is next contended that the District Judge should have agreed with the Munsif in holding that the rise in prices represented 2 annas in the rupee. It appears that in this area there are 2 staple food crops, rice and maize, that rice has risen to the extent of 1 anna 7 pie per rupee, and maize to the extent of 4 pie per rupee. The Munsif took the aggregate, and decreed an enhancement to the extent of 3 annas per rupee while the District Judge has taken the mean or average. As we are informed (and this is not disputed by the landlord-respondent) that both crops grow on all the lands of the holding, we are of opinion that the District Judge is right in taking the mean, and in decreeing an enhancement to the extent of only one anna per rupee. In the result, this appeal is decreed to the extent indicated in the above judgment, that is to say, the enhanced rent decreed is reduced from Rs. 10-9-6 to Rs. 3-15, but as the appellant could have obtained this relief by an application for amendment of the decree, we make no order as to costs.

S. K. B.

APPELLATE CIVIL.

Before Mookerjee and Walmsley JJ.

1917

Aug. 22.

SECRETARY OF STATE FOR INDIA

v.

GANGADHAR NANDA.*

Suit—Limitation—Bengal Tenancy Act (VIII of 1885), ss. 104H, sub-s. (2), 184, 185—Limitation Act (IX of 1908), ss. 29, 15, sub-s. (2), applicability of—Civil Procedure Code (Act V of 1908) s. 80.

A instituted a suit under s. 104H of the Bengal Tenancy Act against the Secretary of State for India in Council on the 10th December 1910, in respect of a village, the Record of Rights of which was finally published on the 2nd June 1910. A took exception to the latter. Prior to the institution of the suit, A served a notice on the defendant as required by s 80 of the Civil Procedure Code :

Held, that the suit was barred by limitation.

Held, also, that s. 15, sub-s. (*2*) of the Limitation Act which was made applicable to suits, appeals and applications mentioned in Schedule III annexed to the Bengal Tenancy Act by virtue of s. 185 sub-s. (*2*), could not possibly apply to suits instituted under s. 104H which were not mentioned in Schedule III. On a plain reading of the provisions of s. 185 of the Bengal Tenancy Act along with s. 15 sub-s. (*2*) of the Limitation Act, the latter could not be applied to extend the period of six months provided for the institution of suits under s. 104H of the Bengal Tenancy Act.

Radhashyam Kar v. *Dinabandhu Biswas* (1), *Sharoop Duss Mondal* v. *Joggessur Roy Chowdhry* (2), *Dulhin Mathura Das Koer* v. *Bansidhar Singh* (3), *Srinivasa Ayyangar* v. *The Secretary of State for India* (4) referred to.

Dropadi v. *Hira Lal* (5) distinguished.

* Appeal from Original Decree, No. 405 of 1914, against the decree of Achinta Nath Mitra, Subordinate Judge of Midnapore, dated March 26, 1913.

(1) (1913) 18 C. W. N. 31 ; 18 C. L. J. 533.
(2) (1899) I. L. R. 26 Calc. 564.
(3) (1911) 16 C. W. N. 904.
(4) (1912) I L R. 38 Mad. 92.
(5) (1912) I. L. R. 34 All. 496.

1917

SECRETARY OF STATE FOR INDIA v. GANGADHAR NANDA.

APPEAL by the Secretary of State for India in Council, the defendant.

The facts necessary for the purposes of this report are shortly these. On the 2nd June 1910, the Record of Rights in respect of the village of Dakhin Baraj was finally published. The respondent one Gangadhar Nanda took exception to the same. On the 10th December 1910, he instituted a suit under s. 104H of the Bengal Tenancy Act against the abovenamed defendant with reference to the aforesaid village. Prior to the institution of the said suit the plaintiff served a notice to the defendant in accordance with the provisions of s. 80 of the Civil Procedure Code, 1908. The plaintiff claimed the benefit of s. 15 sub-s.(*2*) of the Indian Limitation Act and contended that s. 29 of that Act and ss. 184 and 185 of the Bengal Tenancy Act made s. 15 sub-s. (*2*) of the Indian Limitation Act applicable to suits under s. 104H of the Bengal Tenancy Act. The defendant contended that the suit was barred under s. 104H sub-s. (*2*) of the Bengal Tenancy Act. On the 12th April 1913, the Court of first instance decreed the suit.

From that decision the defendant preferred this appeal to the High Court.

The Senior Government Pleader (*Babu Ram Charan Mitra*), for the appellant.

Mr. B. Chakravarti, *Babu Sib handra Palit*, *Babu Kshirod Narayan Bhunia* and *Babu Dhirendra Kishore Roy*), for the respondent.

Cur. adv. vult.

MOOKERJEE AND WALMSLEY JJ. This is an appeal by the Secretary of State for India in Council against a decree in a suit instituted by the respondent on the 16th December 1910 under section 104H of the Bengal Tenancy Act. The lands in suit are comprised in three

1917

SECRETARY OF STATE FOR INDIA v. GANGADHAR NANDA.

villages—Dakhin Baraj, Uttar Digha and Dhai Kukuria. The Settlement Roll, to which exception was taken by the plaintiff, was published, in the case of the first village, on the 2nd June 1910, and in the case of the other two villages, on the 17th June 1910. As regards the claim in respect of the first village, objection is taken that the suit is barred under sub-section (*2*) of section 104H. which provides that a suit under sub-section (*1*) must be instituted within six months of the date of the certificate of final publication of the Record of Rights. This objection does not apply to the second and third villages, and for the reasons assigned in our judgment in *Secretary of State for India* v. *Digambar Nanda* (1) the case must be remitted to the Subordinate Judge for investigation, whether the plaintiff is an occupancy raiyat or a non-occupancy raiyat in respect of the lands comprised in these two villages and for ascertainment of fair and equitable rent payable in respect thereof. In respect of the lands of the village Dakhin Baraj, however, the question of limitation requires careful consideration.

The Record of Rights was finally published on the 2nd June 1910. The suit was instituted on the 16th December 1910, after the expiry of the period of six months prescribed by section 104H, sub-section (*2*). The plaintiff claims the benefit of section 15, subsection (*2*) of the Indian Limitation Act which provides that in computing the period of limitation prescribed for any suit of which notice has been given in accordance with the requirements of any enactment for the time being in force, the period of such notice shall be excluded. In the case before us, the plaintiff served a notice as required by section 80 of the Code of 1908 which provides that no suit shall be instituted against the Secretary of State for India in Council

(1) (1917) 27 C. L. J. 334.

until after the expiration of two months next after notice in writing has been delivered or left at the office of a Secretary to the Local Government or the Collector of the district. Consequently, if section 15, sub-section (*2*) of the Indian Limitation Act is held applicable to the case before us, it is plain that the suit is not open to objection on the ground of limitation. Now the term "prescribed" as used in subsection (*2*) of section 15 read with section 3 obviously means prescribed by the first schedule to the Limitation Act; consequently, this provision cannot, by its own force, extend the period of six months mentioned in section 104H sub-section (*2*) of the Bengal Tenancy Act. The plaintiff-respondent has thus been forced to argue that section 29 of the Indian Limitation Act and sections 184 and 185 of the Bengal Tenancy Act make section 15 sub-section (*2*) of the Indian Limitation Act applicable to suits under section 104H of the Bengal Tenancy Act. In our opinion, there is no force in this contention.

Section 29 (*1*)(*b*) provides that nothing in the Indian Limitation Act shall affect or alter any period of limitation specially prescribed for any suit, appeal or application by any special law or local law now or hereinafter in force in British India. Section 184 of the Bengal Tenancy Act provides that the suits, appeals and applications specified in the third schedule annexed to the Act shall be instituted within the time prescribed in that schedule for them respectively, and every such suit or appeal instituted or application made after the period of limitation so prescribed shall be dismissed, although limitation has not been pleaded. Section 185, sub-section (*1*) then lays down that sections 7, 8 and 9 of the Indian Limitation Act of 1877 shall not apply to suits or applications mentioned in section 184. Section 185, sub-section (*2*)

1917

SECRETARY OF STATE FOR INDIA v. GANGADHAR NANDA.

next provides that, subject to the provisions of Chapter XVI of the Bengal Tenancy Act, the provisions of the Indian Limitation Act of 1877, shall apply to all suits, appeals and applications mentioned in section 184; that is, suits, appeals and applications specified in the third schedule. It is plain beyond reasonable controversy that section 15(2) of the Indian Limitation Act, which is made applicable to suits, appeals and applications mentioned in the third schedule annexed to the Bengal Tenancy Act, by virtue of section 185, sub-section (2), cannot possibly apply to suits instituted under section 104H which are not mentioned in the third schedule. This view is supported by the decision in *Radhasyam* v. *Dinabandhu* (1) where it was ruled that section 18 of the Limitation Act does not apply to an application under section 174 of the Bengal Tenancy Act. Much stress, however, has been laid on the decision of a Full Bench of the Allahabad High Court in *Dropadi* v. *Hira Lal* (2) where a question arose as to the applicability of the provisions of the Indian Limitation Act to proceedings in insolvency. That case is clearly distinguishable; but it may be observed that the decision has not always been regarded with favour: *Thakur Prasad* v. *Panno Lal* (3), *Manjuluri* v. *Singumakanti* (4), *Abu Backer Sahib* v. *The Secretary of State for India in Council* (5). There is also no analogy between the case before us and the decisions in *Sharoop Dass Mondal* v. *Joggessur Roy Chowdhry* (6), *Dulhin Mathura Das* v. *Bansidhar Singh* (7) and *Srinivasa Ayyangar* v. *The Secretary of State for India* (8). A question of the

(1) (1913) 18 C. W. N. 31; 18 C. L. J. 533.
(2) (1912) I. L. R. 34 All. 496.
(3) (1913) I. L. R. 35 All. 410.
(4) (1915) 18 Mad. L. T. 200.
(5) (1909) I. L. R. 34 Mad 505.
(6) (1899) I. L. R. 26 Calc. 564.
(7) (1911) 16 C. W. N. 904.
(8) (1912) I. L. R. 38 Mad. 92.

description now before us must be determined by a reference to the terms of the special statute, and on a plain reading of the provisions of section 185 of the Bengal Tenancy Act taken along with section 15, sub-section (*2*) of the Limitation Act, we feel no doubt whatever that section 15(*2*) cannot possibly be applied to extend the period of six months provided for the institution of suits under section 104H of the Bengal Tenancy Act. In our opinion the suit is barred by limitation in respect of the lands comprised in village Dakhin Baraj.

The result is that this appeal is allowed and the decree of the Subordinate Judge set aside. The suit will stand dismissed in respect of the lands in village Dakhin Baraj. With regard to the lands of Uttar Digha and Dhai Kukuria, the decree of this Court will declare that the plaintiff is a *raiyat* and not a tenure-holder, and the case will be remitted to the Subordinate Judge to determine whether the plaintiff is an occupancy raiyat or a non-occupancy raiyat and then to ascertain the amount of fair and equitable rent payable by him according to his status. Each party will pay his own costs both here and in the Court below up to the present stage. The costs after remand will abide the result.

L. R. *Appeal allowed and case remanded.*

APPELLATE CIVIL.

Before Mookerjee and Beachcroft JJ.

1917

Aug. 23.

MADHUSUDAN MAHTON

v.

MIDNAPORE ZEMINDARI CO.*

Lease—Darpatni, conditions in—Bengal Tenancy Act (VIII of 1885), ss. 159 cl. (b), 179—Transfer of Property Act (IV of 1882), s. 10—Receiver—Appointment of Receiver in administration suit—Civil Procedure Code (Act XIV of 1882), ss. 503, 505.

A, a *patnidar*, created a *darpatni*, in 1886 in favour of B, which contained the following terms: "like yourself we shall have full rights to grant leases or make settlements of land in the mofussil; but if these *darpatni* mahals be sold at auction for arrears of malikana (rent) due to you, then all agreements entered into by us shall be extinct (stand annulled)." The common manager of B's estate granted to the defendants a permanent under-tenure in 1901. B having defaulted to pay rent to A, the latter in execution of a decree for arrears of rent purchased B's interest on the 21st September 1904; the sale was confirmed in due course on the 20th March 1905. The Receiver of the estate of A, appointed by a decree in an administration suit, without permission from the District Judge, granted a *darpatni* to the plaintiff in 1906:

Held, that A and B were competent to enter into a contract of permanent tenancy subject to the restriction actually imposed, which was one of the incidents of the under-tenure and ran with the land so as to be operative not only between the grantors and grantees but also their representatives in interest and the holders of derivative titles from them.

Held, also, that the condition in the lease not being an absolute restraint on alienation and being for the benefit of the lessor, neither the provisions of s. 159 of the Bengal Tenancy Act nor s. 10 of the Transfer of Property Act had any application.

Held, further, that the Receiver not being appointed under s. 503 of the Civil Procedure Code of 1882 but by a decree in an administration

*Appeal from Original Decree, No. 21 of 1911, against the decree of Paresh Chandra Banerjee, Subordinate Judge of Midnapore, dated Sep. 30, 1910.

suit the provisions of s. 505 requiring permission of the District Judge did not apply and the *darpatni* granted by such Receiver was valid and unassailable.

APPEAL by Madhusudan Mahton and others, the defendants.

In this suit the plaintiffs, the Midnapore Zemindari Co., claimed to have acquired proprietary interest as well as several subordinate rights in certain lands in Perganah Sildah. The defendants, on the other hand, set up a two-fold title to the disputed lands, viz., one under a lease granted to them on the 27th July 1901, by one Natabar Datta and another a pre-existing tenancy right called *mandali* independently of the lease. The aforesaid lease was created in the manner following. In 1901, the sons of one Gangaram Datta were the *darpatnidars* of the disputed lands under a lease granted to them on the 6th September 1886, by one Janmejoy Mullick who himself was the *patnidar* of a half share. The purport of the said lease was to the effect that the *darpatnidar* should have full rights to grant leases and create encumbrances subject only to the restriction that if the *darpatni* was sold for arrears of rent the subordinate titles created by the *darpatnidar* should at the same time come to an end. Natabar Datta, one of the sons of Gangaram, was appointed common manager of the estate of the Dattas and as such granted on the 27th July 1901, to the defendant's predecessor in title a permanent under-tenure. On the 21st September 1904, the Dattas having defaulted to pay rent to the Mullicks, the latter in execution of a decree for arrears of rent purchased the *darpatni* interest and such sale was confirmed in due course on the 20th March 1905. On the 17th March 1906, the plaintiffs obtained a *darpatni* lease from a Receiver to the estate of the Mullicks appointed by virtue of a decree dated the 5th September 1890, made in an

1917

MADHUSUDAN MAHTON v. MIDNAPORE ZEMINDARI CO.

administration suit, in respect of a half share of Perganah Sildah inclusive of the lands in suit.

The Court of first instance decreed the suit holding that the lease of the 27th July 1901, was fraudulent, illegal and invalid and that independently thereof the defendants had no title to the lands of the village other than those included in a schedule to the plaint.

From that decision the defendants preferred this appeal to the High Court.

Babu Hirendranath Ganguli, for the appellants.

Mr. C. R. Das, Mr U. N. Sen Gupta, Babu Biraj Mohan Mazumdar and *Babu Probodh Kumar Das*, for the respondents.

Cur. adv. vult.

MOOKERJEE AND BEACHCROFT JJ. This is an appeal by the defendants in a suit for confirmation of possession of land and declaration of title, or, in the alternative for assessment of fair and equitable rent thereon. The subject matter of the litigation is a large tract of land in mauzah Brahmandia in Perganah Sildah. The plaintiffs claim to have acquired proprietary interest as well as several subordinate rights in the village, and their case is that the defendants, though they are their tenants only in respect of the lands comprised in schedule 'ক' to the plaint, have set up an unfounded claim to the other lands of the village, on the basis of a lease granted in their favour by one Natabar Datta on the 27th July 1901. The Subordinate Judge has held that this lease was fraudulent, illegal and invalid, and that, independently thereof, the defendants had no title to the lands of the village other than those included in schedule 'ক.' The defendants have appealed to this Court against the decree of the Subordinate Judge.

1917

MADHUSUDAN MAHTON v. MIDNAPORE ZEMINDARI CO.

The suit was tried in the Court below along with 395 other suits, which related to various lands situated in one or other of 165 mauzas included in Perganah Sildah. The evidence, oral and documentary, is extremely voluminous and the paper-book, which has been placed before us, has been prepared apparently on the assumption that an appeal had been preferred to this Court in each of the 396 suits. As a matter of fact, the appeal before us relates to only one of these suits, and we are informed that the appeals in the other suits are pending before the District Judge, as the value of the subject matter in each of those cases does not exceed Rs. 5,000. The evidence relevant for the determination of the matters, substantially in controversy in this appeal, is comprised in a relatively small compass and the questions at issue are by no means complex or difficult of solution.

The defendants set up a two-fold title to the lands in dispute, namely, *first*, a title under the lease granted by Natabar Datta on the 27th July 1901; and, *secondly*, a pre-existing tenancy right called *mandali* right, independent of the lease. It will be convenient to investigate separately the validity of the two titles just mentioned.

As regards the title on the basis of the lease of 1901, the material facts are not disputed.

In 1901, the sons of one Gangaram Datta were *darputnidars* of the disputed lands under a lease granted to them on the 6th September 1886 by Chaudhuri Janmejoy Mullick, who was himself *patnidar* of a half share. Natabar Datta, one of the sons of Gangaram Datta, had been appointed common manager of the estate of the Dattas under the provisions of the Bengal Tenancy Act.

On the 27th July 1901, Natabar Datta, as common manager, granted to the father of the defendants a

1917

MADHUSUDAN MAHTON v. MIDNAPORE ZEMINDARI Co.

permanent under-tenure, which, if still operative in law, entitles them to possession of the lands in suit. The Dattas defaulted to pay rent regularly to the Mullicks, with the result that on the 21st September 1901. the latter, in execution of a decree for arrears of rent due from the former under the *darpatni*, purchased the *darpatni* interest, and the sale was confirmed in due course on the 20th March 1905. The plaintiffs claim under a derivative title from the Mullicks and their contention is, that the effect of the rentsale was to extinguish whatever interest the defendants might have acquired under the lease from the Dattas. To test the validity of this contention, we have to examine the terms of the *darpatni* lease granted by the Mullicks to the Dattas on the 6th September 1886. The thirteenth paragraph of the *darpatni kabuliat* executed by the Dattas in favour of the Mullicks, was in these terms:

"Like yourself, we shall have full rights to grant leases or make settlements of lands in the mofussil; but if these *darpatni* mehals be sold at auction for arrears of malikana (rent) due to you, then all agreements entered into by us shall be extinct (stand annulled)."

There is really no room for controversy as to the exact meaning of this provision in the lease. The parties clearly intended that the *darpatnidar* should have full rights to grant leases or create incumbrances, subject only to the restriction that if the *darpatni* was sold for arrears of rent, the subordinate titles created by the *darpatnidar* should at the same time come to an end. The defendants have consequently been constrained to argue that the stipulation was void in law, because it contravened the provisions of section 159 of the Bengal Tenancy Act and section 10 of the Transfer of Property Act. In our opinion, there is no force in this contention.

Section 159 of the Bengal Tenancy Act, no doubt, provides that the purchaser of a tenure, sold in execution of a decree for arrears due in respect thereof, shall take with power to annul incumbrances, and that the power to annul is exercisable only in the manner provided in section 167. But section 179, which is applicable to the case before us, provides that nothing in the Bengal Tenancy Act shall be deemed to prevent a holder of a permanent tenure in a permanently-settled area, from granting a permanent mokarari lease on any terms agreed on between him and his tenant. It is clear that section 179 controls clause (*b*) of the proviso to section 159. It was consequently competent to the Mullicks and Dattas to enter into a contract of permanent tenancy, subject to the restriction actually imposed, namely, that subordinate interests carved out by the Dattas, would be extinguished on a sale of their under-tenure for arrears of rent. This was one of the incidents of the under-tenure created in favour of the Dattas by the Mullicks, and it ran with the land so as to be operative, not merely between the grantors and grantees, but also between their representatives in interest and the holders of derivative titles from them. Section 159 is consequently of no assistance to the defendants.

Section 10 of the Transfer of Property Act is equally of no avail. That section provides that where property is transferred, subject to a condition or limitation absolutely restraining the transferee or any person claiming under him from parting with or disposing of his interest in the property, the condition or limitation is void, except in the case of a lease where the condition is for the benefit of the lessor or those claiming under him. In the first place, there was here no absolute restraint on alienation by the Dattas; the only restriction imposed was that the holder of a

1917

MADHUSUDAN MAHTON v. MIDNAPORE ZEMINDARI Co.

derivative title from them would be in peril in the event of a sale of the under-tenure for arrears of rent. In the second place, the transaction was a lease and the condition was obviously for the benefit of the lessor. The under-tenure was the security for the rent charged thereon, and the grantors were competent to impose a restriction of this character, to ensure that the property might fetch full value in the event of a sale for arrears of rent. In our opinion, there is no possible escape from the position that the effect of the sale held at the instance of the Mullicks on the 21st September 1904, for realisation of arrears of rent, was to extinguish the subordinate interest created by the Dattas in favour of the predecessor of the defendants.

The next question which requires consideration is, whether the plaintiffs are competent to contend that the legal effect of the rent-sale was to sweep out the subordinate interest created by the Dattas in favour of the defendants. The position of the plaintiffs has been assailed by the defendants, on the ground that the special title acquired by the Mullicks at the sale for arrears of rent, has not legally vested in them. In our opinion there is no foundation for this contention. On the 17th March 1906, the *plaintiffs* obtained a *darpatni* lease from the Mullicks in respect of a half share of Perganah Sildah inclusive of the lands in suit. There can be no question that if this lease is valid and operative, the plaintiffs can successiully contend, precisely to the same extent and in the same manner as their grantors, the Mullicks, that the effect of the rent sale was to terminate the interest created in favour of the defendants by the Dattas on the 27th July 1901. The defendants have, however, argued that the *darpatni* granted to the plaintiffs by the Dutts on the 17th March 1906 was invalid and inoperative, inasmuch as it was granted by a Receiver to the estate of the

Mullicks, who it is alleged had been appointed by the Subordinate Judge in excess of authority conferred on him by law. It appears that in 1890 a suit was instituted for the administration of the estate of the Mullicks. On the 5th September 1890, the Subordinate Judge made the usual administration decree and appointed a Receiver to that estate. The decree was in conformity with the form prescribed in the Civil Procedure Code of 1882 (Form 130). The Receiver first appointed was subsequently replaced by another gentleman, who, in his turn was replaced by a third. The contention of the defendants is that the gentleman who was Receiver in 1906 was appointed as such without the sanction of the District Judge, and, that consequently his appointment was *ultra vires*, as under the Civil Procedure Code of 1882 the appointment of a Receiver under section 503 could have been made only with the sanction of the District Judge under section 505. There is no substance in this argument. The Receiver was appointed, not under section 503 of the Code, but by the decree in the administration suit. The administration suit had been instituted for the purpose of satisfaction of the debts due to the creditors of the Mullicks. It was thus incumbent upon the Court to take steps to raise money by sale or lease or any other suitable mode of alienation of the properties comprised in the estate; to effectuate the object in view, the Court, by its decree, appointed a Receiver. The parties to the litigation acquiesced in this decree, and its propriety is unquestionable. The terms of the *darpatni* lease were settled by the Court; the premium fixed was paid into Court and applied in discharge of the debts due from the estate, and the Subordinate Judge himself attested the documents granted to the plaintiffs. In our opinion, the *darpatni* is valid and unassailable, and the significant

1917

MADHUSUDAN MAHTON v. MIDNAPORE ZEMINDARI CO.

fact remains unchallenged that the Mullicks have not only never questioned its propriety, but have actually affirmed it, as is clear from the terms of the conveyance executed by them in favour of the plaintiffs on the 11th January 1908. We hold accordingly that, at the date of the institution of this suit, the lease granted by the Dattas in favour of the defendants on the 27th July 1901, was not in operation and did not furnish an answer to the claim.

As regards the question, whether the defendants have a tenancy right in respect of the disputed lands, independently of the lease granted by the Dattas on the 27th July 1901. It is important to observe that there is no documentary evidence to support the contention of the defendants. There is no initial grant, no confirmatory lease, indeed, no documents whatever which recite even the existence of such a lease. The defendants urge, however, that the rent receipts describe the leasehold property as mauzah Brahmandia, which indicates that they were tenants of the entire village, although they used to pay rent in proportion to the cultivated lands alone, exclusive of the waste and forest. The rent receipts, in our opinion, do not furnish a reliable guide in this matter, and they do not prove that the defendants had a tenancy right over all the lands in the village. There is also no foundation for the assertion that because the defendants claim a *mandali* right, such right extends over the whole village; in fact, the extent of the right is in controversy in each of the 396 suits, and it would not be a legitimate method of reasoning to hold, in an individual case, that the extent of the *mandali* right was as alleged by the defendants, merely because a similar claim had been put forward and was still the subject of controversy in other pending litigations. In our opinion, the answer to the question whether the defendants have their alleged

tenancy right in the entire village must depend upon the evidence of possession adduced in the case. Tested from this point of view, their case has completely broken down. There are really only three witnesses on the side of the defendants who assert their exclusive possession of the disputed lands, namely, Madhusudan Mahton, Krishna Mahton and Gangadhar Mahton. There is, on the other hand, reliable evidence to show that plaintiffs have been in possession of considerable tracts of lands within the disputed area, where indigo has been grown by them or by their predecessors. Indeed, the defendant Madhusudan Mahton was obliged to concede this in cross-examination. This is plain, moreover, from the map prepared by the Commissioner on the 12th October 1909, and from the report submitted by him. Besides this, there is evidence to show that the Watsons, the predecessors of the plaintiffs, successfully sued the Dattas in respect of indigo grown on large tracts of land in Brahmandia within the disputed area. The evidence makes it clear that the defendants have not been in exclusive occupation of the disputed lands as comprised within their alleged tenancy of the lands of the entire village.

The result is that the decree of the Subordinate Judge must be affirmed, and this appeal dismissed with costs. Each party, however, will pay his own costs of the preparation of the paper-book.

L. R. *Appeal dismissed.*

ORIGINAL CIVIL.

Before Greaves J.

1918

Feb. 28.

In re SURENDRA CHANDRA GHOSE.*

Municipal Election—Election Roll—Qualifications of voters—Sitting commissioner as candidate for election—Objections to voters' claims to be on Election Roll—Chairman's decision refusing to expunge names of voters from the Roll—Jurisdiction of the High Court to interfere—"Occupier"—Specific Relief Act (I of 1877), s. 45—Calcutta Municipal Act (Beng. III of 1899), ss. 3 (30), 37, 47, and Sch. IV, rules 3, 8 (1).

The sitting Commissioner for one of the wards in the Calcutta Municipality, who was one of the candidates for election as a Commissioner for that same ward at the forthcoming municipal election, and who was also a voter on the list of voters in respect of another ward, objected that the names of various persons should not be entered and retained on the Municipal Election Roll for the ward for which he was a candidate. The Chairman of the Corporation having heard the objections, refused to expunge those names from the Election Roll.

Held, that the High Court had jurisdiction under s. 45 of the Specific Relief Act to interfere in this matter.

In re Nisith C. Sen (1) and *In re Romesh Chandra Sen* (2) followed.

Held, also, that to make a person, who occupied certain premises, and who was entitled to the owner's vote in respect thereof, entitled to a vote as occupier in respect of the same premises, he must either pay rent to the owner or be liable to pay rent.

Held, also, that voters must give written notice of their claims, whether they sign the notice or not, to the Chairman of the Corporation under the provisions of rule 8 (*i*) of Sch. IV of the Calcutta Municipal Act prior to 1st January immediately preceding each general election. It was upon the person objecting to the votes to prove that the voters had not complied with the provisions of the Act or the rules.

Held, also, that the only persons to whom rule 3 of Sch. IV of the Calcutta Municipal Act applied, were persons who were actually liable for the rates in respect of the six months specified therein.

* Ordinary Original Civil Jurisdiction.

(1) (1912) I. L. R. 39 Calc 754. (2) (1912) 16 C. W. N. 472.

1918

SURENDRA CHANDRA GHOSE, *In re.*

Held, also, that persons occupying flats or portions of houses used as flats which were not separately assessed as such in the records of the Corporation, were not associations of individuals within the meaning of s. 37 of the Calcutta Municipal Act.

Held, also, that the word "occupier" in section 37 (*2*) (*i*) (*c*) and in section 37 (*2*) (*i*) (*a*) of the Calcutta Municipal Act meant an occupier in the ordinary sense and not as defined in s. 3 (*30*) of that Act, and the only person who fell within section 37 (*2*) (*i*) (*c*) was a person who occupied a building separately numbered and valued for assessment.

RULE obtained by Surendra Chandra Ghose, a candidate for election as Municipal Commissioner.

The General Election of Municipal Commissioners for the town of Calcutta was notified to be held on the 20th March 1918. Prior to this the Chairman under the provisions of the Calcutta Municipal Act duly prepared and published the list of persons appearing entitled to entry in the Municipal Election Roll. Within the statutory period allowed for objections various persons claiming to have their names inserted in the list of voters, gave written notice of their claims to the Chairman. One Surendra Chandra Ghose, the sitting Commissioner for Ward XVII and one of the candidates for election as a Commissioner for that ward and also a voter whose name appeared in the list of voters prepared for Ward XXII, objected to various persons claiming to be entitled to be entered and to have their names retained on the list of voters for the ward for which he was a candidate for election as Commissioner. He notified his objection in writing to the Chairman and also to the different voters objected to. On the 12th February, 1918, the Deputy Chairman, under the powers delegated to him by the Chairman under the provisions of the Calcutta Municipal Act for the purpose of revising the said list for final publication on the 1st March, 1918, heard all the claims and objections in respect thereof and disallowed Surendra Chandra Ghose's objections. Surendra

1918

SURENDRA CHANDRA GHOSE, *In re.*

Chandra Ghose, thereupon, applied to the High Court and obtained a Rule calling upon the Chairman to show cause why the names of various persons mentioned in the preliminary list should not be expunged from the Municipal ElectionRoll for the next Municipal election. In his petition Surendra Chandra Ghose alleged, *inter alia*, that the Deputy Chairman wrongfully disallowed the petitioner's objections to the retention on the Municipal Election Roll, (a) of the names of occupiers of flats or portions of houses, which were not separately numbered and valued for assessment purposes as laid down in section 37 (*2*) (*i*) (*a*) of the Calcutta Municipal Act; (b) of the name of Mr. Alistair Cameron, who was a member of the firm of Mackinnon, Mackenzie & Co., and who, though in occupation of the premises No. 12, Elysium Row, situate in Ward XVII, was not entitled to the occupier's votes on the ground that he did not pay any rent to his firm; (c) of the names of occupiers of flats or portions of houses, which were not separately numbered and valued for assessment purposes; (d) of the names of occupiers, who had not till then paid the Municipal rates for the properties, of which they were in such occupation for the first two quarters of the current official year; and (e) of the names of persons, who had not themselves given written notice of their claims under rule 8(*1*) to the Chairman on or before the 1st January, 1918. The Rule came on for hearing on the 25th February, 1918. Mr. Justice Greaves, after having disposed of the preliminary objection on behalf of the Chairman, directed that the Rule be served individually on the voters against whom objection was taken by the petitioner, and adjourned the Rule to the 28th February, 1918, so that the matter might be disposed of before the date specified by the Calcutta Municipal Act for printing and publishing the revised list.

Mr. Langford James, for the Chairman of the Corporation, took two preliminary objections. *First*, in cases of this sort there was no provision in the Act for an appeal from the Chairman's decision which was final. The High Court, therefore, had no jurisdiction to deal with this matter. *Secondly*, the provisions of s. 45 of the Specific Relief Act were not applicable to the present application. In order to bring it within that section, it was necessary to show that all the conditions under that section had been fulfilled, in other words, that it was necessary to find that the petitioner was injured in respect of his property, franchise or personal right. None of these was affected by what was done.

Mr. C. C. Ghose (with him *Sir B. C. Mitter*, *Mr. A. N. Chaudhuri*, *Mr. N. Circar* and *Mr. R. C. Bonnerjee*), for the petitioner. It was sufficient for the purpose of bringing this case within s. 45 of the Specific Relief Act to state that the petitioner had been seriously prejudiced and this he had stated in his petition. There were numerous cases to support the contention that applications of this nature fell under s. 45 and the High Court had jurisdiction to deal with them: see *In re Nisith C. Sen* (1) and *In re Romesh Chandra Sen* (2).

Mr. Langford James, in reply. The petition had failed to comply with all the conditions of s. 45 of the Specific Relief Act and to show in what way he would be seriously prejudiced.

[The Court directed the petitioner to serve a copy of the Rule individually on each voter against whom objection was taken, and adjourned the case to the 28th February, 1918.]

Mr. A. N. Chaudhuri, in support of the Rule, stated that with the exception of three persons, whom

(1) (1912) I. L. R. 39 Calc. 754 (2) (1912) 16 C. W. N. 472.

1918

SURENDRA CHANDRA GHOSE, *In re.*

it was difficult to find, service of the Rule had been effected on the remainder. With respect to those three persons it would be for the Chairman to consider whether it would be necessary to retain their names on the list of voters. The petitioner did not wish to make the Rule absolute against them.

Mr. Langford James showed cause. The only question which arose in this case was whether the names of certain persons ought to have been on the Election Roll. The question as to the number of votes to which they would be entitled was not in issue. Objections were raised with respect to 5 classes of persons: (*1*) Exhibit B contained the names of persons who occupied flats only and not the whole house. Section 36 of the Act dealt with the Election Roll, and s. 37 with the necessary qualification entitling a person to be placed on the Roll. Persons occupying flats fell under s. 37 (*2*) (*i*) (*c*). "Occupier" was defined by s. 3 (*30*) of the Act. A person living in one of the flats of a house was a person paying or liable to pay a portion of the rent of the building. The evidence showed that the particular persons in this case paid their rent to the respective owners of the houses. They were, therefore, entitled to be on the Roll.

Sir B. C. Mitter, in explaining his position, submitted that he would rely on s. 47 of the Act.

Mr. Langford James. S. 47 dealt with the number of votes to which voters were entitled. There might be some difficulty about the additional votes mentioned in that section. That was not the point here. (i) They were clearly entitled to one vote each, and as such, to be on the Roll. (ii) Exhibit C contained the names of persons whose names did not appear in the assessment book. If their names were not in the assessment book the error could be corrected now.

(iii) Exhibit D contained the names of persons who had not in fact paid rates and taxes for the two quarters preceding October, 1917. No rates and taxes were due. The rule could only refer to any rates and taxes in fact payable. (iv) Exhibit E contained the names of persons who did not themselves send in a written claim to be on the list. They as a matter of fact did sign their own application, though that was not necessary. (v) As to the name of the individual voter, Mr. Alistair Cameron, he paid the equivalent of rent. He got the house rent-free as part of the consideration for his services to his firm.

Sir B. C. Mitter, in reply. There was no evidence that the persons mentioned in Exhibit E signed the notice under the provisions of Rule 8 (*1*) of Sched. IV of the Act. As regards the persons mentioned in Exhibit D, the only condition with regard to them was that they should be persons who lived in the locality and had paid taxes. With reference to Exhibits B and C, s. 37 of the Act contemplated two classes, namely, those jointly voting and those voting separately. The Act drew a sharp distinction between individual and collective voting. Under s. 47, if there was no separate assessment of a building in flats, there could be no separation of votes. The definition of "occupier" in s. 3 (*30*) did not apply to that word in s. 37 (*2*) (*i*) (*c*). Finally with respect to Mr. Cameron, he was not an occupier paying rent.

GREAVES J. On the 22nd February last I granted a Rule at the instance of Mr. Surendra Chandra Ghose calling on the Chairman of the Corporation of Calcutta to show cause why certain names should not be expunged from the Municipal Election Roll. The Rule was served in the first instance on the Chairman alone and was returnable on Monday last. When the Rule

1918

SURENDRA CHANDRA GHOSE, *In re.*

GREAVES J.

came on for hearing, on that day two preliminary objections were taken by counsel on behalf of the Chairman of the Corporation. *First*, it was said that the decision of the Chairman was final and that the Court had no jurisdiction to deal with the matter; *secondly*, it was said that the applicant did not bring himself within the provisions of section 45 of the Specific Relief Act, under which alone the Court had jurisdiction. So far as the first objection is concerned, it seems to me that unless the Municipal Act specifically lays down that the decision of the Chairman is final, the jurisdiction of the Court under section 45 of the Specific Relief Act is not ousted. I find no provision in the Municipal Act expressly making the decision of the Chairman final, therefore, it seems to me that the first preliminary objection fails, and that the applicant is entitled to make his application if he brings himself within the provisions of section 45 of the Specific Relief Act. So far as the second objection is concerned, it is said that Mr. Ghose, who is a voter for Ward XXII and who is the sitting Commissioner for Ward XVII, and who also expresses his intention of becoming a candidate at the ensuing election, is not within the terms of section 45 of the Specific Relief Act, having regard to the fact that his property, franchise or personal right is not affected by what has been done. I think there are two answers to this. First of all, the Municipal Act itself gives to a person in his position a right to object before the Chairman or his Deputy to votes that are put upon the Election Roll. That being so, I think it is difficult for the Chairman to argue that the applicant does not fall within section 45 (*a*) of the Specific Relief Act. But there is one other reason also, which to my mind so far as I am concerned, is conclusive against this objection. In two cases, *In re Nisith C.*

Sen (1), *In re Romesh Chandra Sen* (2), the Court has interfered in matters of this nature under section 45 of the Specific Relief Act. And in *In re Romesh Chandra Sen* (2), the applicant was in exactly the same position as the applicant before me. Consequently, I think that I am bound, sitting here, by the above decisions to hold that the Court has jurisdiction under section 45 of the Specific Relief Act in this matter. After hearing these two preliminary objections on the 25th February, I directed the Rule to be served on the persons whose votes were sought to be affected and the Rule on its merits was argued before me to-day.

There are four classes of voters who are objected to, and one individual voter Mr. Alistair Cameron. So far as Mr. Cameron is concerned, it appears upon the evidence that he occupies the premises No. 12, Elysium Row, as the senior partner in the firm of Messrs. Mackinnon, Mackenzie & Co. They are the registered owners of that house, and I understand that Mr. Cameron as one of the partners is entitled to the owner's vote in respect of these premises. What I have got to decide upon the evidence before me is whether he is entitled to an occupier's vote in respect of these premises. To make him entitled to a vote as occupier in respect of these premises he must either pay rent to the owner or be liable to pay rent Upon the evidence before me I have no evidence that he either pays rent to the owner or that he is liable to pay rent. I can only deal with the matter upon the materials before me, and so I hold that upon the evidence before me he is not entitled to be on the Municipal Election Roll as an occupier in respect of the premises No. 12, Elysium Row.

Then the next class of voters that I come to are the four names which are set out in Exhibit E to the

(1) (1912) I. L. R. 39 Calc. 754. (2) (1912) 16 C. W. N. 472.

1918

SURENDRA CHANDRA GHOSE, *In re.*

GREAVES J.

petition. They apparently are objected to because it is said that they did not give written notice of their claim to the Chairman of the Corporation under the provisions of rule 8 (*1*) of Schedule IV prior to 1st January last. I am satisfied upon the evidence that a written notice on their behalf was in fact given. It is not shown by the person who objected to their votes that that written notice was not given before the 1st January, 1918, and it is upon the person objecting to their votes to prove that they have not complied with the provisions of the Act or the rules; and accordingly I disallow the objection to their votes. I accept the evidence before me that these gentlemen not only gave written notice, which I think would be sufficient whether they signed the notice or not, but that they actually in fact signed the notice themselves. Accordingly I dismiss the application to expunge the votes so far as the names contained in Schedule E are concerned.

So far as Schedule D is concerned, the objection taken to these gentlemen is that they have not paid, within the meaning of rule 3 of Schedule IV, the rates for the period from the 31st March, 1917, to the 30th September, 1917. It seems to me that the answer to that argument is contained in the petition of the petitioner himself. He shows the dates upon which these persons first occupied the respective premises which are set against their names. It is clear from this that they were not liable for the rates for those six months. Therefore, the objection of the petitioner, so far as these gentlemen are concerned, fails, and I hold, upon the construction of the rule and the portion of the Act applicable to this case, that the only persons to whom the rule applies are persons who are actually liable for the rates in respect of those six months.

I now come to the objections with regard to the persons named in Exhibits B and C to the petition. Apparently there are three persons Mr. Remfry, Mr. Pugh and Mr. Montgomery who have not been served with the Rule, and so any order that I make with regard to the votes of the persons contained in schedules B and C will not affect the votes of those persons except in so far as the Chairman thinks fit to follow such guidance as he may receive from the decision which I am about to give in regard to the voters in exhibits B and C.

The voters in respect of Schedules B and C fall practically within the same category except that there is this one difference. So far as the voters in Exhibit C are concerned their names are not, at the time this application comes before me, in the assessment book. With that exception their votes stand upon the same footing. So far as these persons are concerned it appears upon the evidence that it is not in dispute that they occupy flats or portions of houses used as flats, which are not separately numbered as such and are not separately assessed as such in the records of the Corporation, and the question that I have got to decide, subject to the point that I have mentioned with regard to the names in schedule C, is whether under those circumstances they are entitled to vote within the provisions of section 37 of the Calcutta Municipal Act. So far as they claim as associations of individuals although this was not specifically urged before me by counsel who appeared on behalf of the Chairman of the Corporation, although it was faintly hinted at, I should certainly not be prepared to hold that they are associations of individuals within the provisions of section 37 (*3*) of the Calcutta Municipal Act. Associations of individuals (although I do not propose to lay down any definition) must I think be persons

1918

SURENDRA CHANDRA GHOSE, *In re.*

GREAVES J.

who are associated for some common object, and the mere fact that they occupy portions of a house sub-divided into flats does not, to my mind, make them associations of individuals within the meaning of section 37 of the Calcutta Municipal Act. Section 37 (*1*) provides for the voting of a person or a company, body corporate, firm, Hindu joint family, or other association of individuals; and section 37 (*2*) provides that a person shall not be entitled to be enrolled in the Municipal Election Roll, as a voter of any ward, unless he is of the male sex and has attained the age of 21 years, and resides or pays rates or other taxes under this Act in Calcutta and (*1*) has his name entered in the Assessment book thereinafter prescribed as showing that he is (*c*) an occupier of some building in Calcutta separately numbered and valued for assessment purposes at not less than 300 rupees per annum. Apart from the definition of "occupier" in section 3 (*30*) of the Act, I should certainly have been of the opinion that the persons, whose names are set out in schedules B and C and who occupy flats in the manner I have described, are not occupiers of some building separately numbered and valued for assessment purposes within the meaning of section 37 (*2*) (*i*) (*c*) of the Calcutta Municipal Act. I am fortified in that by the provisions of section 47 of the Act, which is the section dealing with additional votes of occupiers having regard to the aggregate value of the buildings occupied in the ward by an occupier coming under section 37 (*2*) (*i*) (*c*).

I now come to the definition of "occupier" in the Act. "Occupier", see section 3 (*30*), is defined as meaning, unless there is anything repugnant in the subject or context, any person for the time being paying or liable to pay to the owner the rent or any portion of the rent of the land or building in respect

1918

SURENDRA CHANDRA GHOSE, *In re.*

GREAVES J.

of which the word is used, and includes an owner living in his own house or hut. It is said that if I read the words of this definition into section 37 (*2*) (*i*) (*c*) of the Act, that these persons in schedules B and C are clearly entitled to vote as they are persons liable to pay some portion of the rent of a building in Calcutta separately numbered and valued for assessment purposes, and the point that I have got to decide is whether the word "occupier" in section 37 (*2*) (*i*) (*c*) is the occupier as defined in section 3 (*30*) of the Act. It is at first sight rather difficult to say that it is not, when you have a definition in the Act, saying what "occupier" means. Counsel for the applicant relies in support of his argument that occupier in section 37 (*2*) (*i*) (*c*) does not mean or accord with the definition in section 3 (*30*) or section 47 to which I have already referred, and also on the fact that he says that section 37 divides into two parts, the first part dealing with votes by bodies corporate or companies, and the second dealing with personal votes. I am not quite sure that he is right in this, because if you look at section 37 (*1*) you find that the first words in it are "a person" and so on. But the conclusion I have come to—and I can only regret that I am forced to give my decision without further consideration—is that the word "occupier" in section 37 (*2*) (*i*) (*c*) does not mean the occupier who is defined in section 3 (*30*). The word "occupier" is also used in section 37 (*2*) (*i*) (*a*) and I think that in that sub-clause it is not used as the occupier as defined in section 3 (*30*), for the person entitled to vote under that sub-clause is the owner and occupier and accordingly "occupier" there cannot mean the person paying or liable to pay rent to the owner who is himself. Does occupier, therefore, mean one thing in section 37 (*2*) (*i*) (*a*) and another thing in section 37 (*2*) (*i*) (*c*)? I think not. I think in

1918

SURENDRA CHANDRA GHOSE, *In re.*

GREAVES J.

both places occupier means an occupier in the ordinary sense and not as defined in section 3 (*30*). I think I must take section 37 (*2*) (*i*) (*c*), so far as occupier is concerned, by itself and apart from the definition and I must hold that the only person who falls within that sub-section is a person who occupies a building separately numbered and valued for assessment. That being so, the names within schedules B and C do not to my mind fulfil the provisions of section 37 (*2*) (*i*) (*c*), and so far as they are concerned the Rule succeeds. I make the Rule absolute so far as Exhibits B and C are concerned and so far as Mr. Alistair Cameron is concerned, but not as regards the names of the persons who have not been served. As the Rule has succeeded in part and has failed in part, I think the proper order is that there should be no order as to costs.

O. M.

Attorneys for the petitioner: *Kar Mehta & Co.*

Attorney for the Chairman of the Corporation: *M. L. Sen.*

END OF VOL. XLV.

GENERAL INDEX

PAGE.

Abatement of Suit : *See* LIMITATION ... 94

——— ——— : *See* PARTIES ... 860

Abduction—*Abduction of married woman with intent to compel her to marry another*—"*Marry*" *meaning of*—*Penal Code* (*Act XLV of 1860*), *s.. 366*—*Valid Marriage.* Section 366 of the Penal Code applies to the case of abduction of a married woman with intent to compel her to marry. The word "marry" therein implies, as in *s.* 494, going through a form of marriage, whether the same is in fact valid or not. TAHER KHAN AND OTHERS v. EMPEROR (1917) I. L. R. 45 Calc 641

Abwab : *See* ILLEGAL CESS 259

——— *See* PESHKOSH 866

Account, suit for : *See* COURT-FEE ... 634

Account Books, entries in, as evidence : *See* MAHOMEDAN LAW—MARRIAGE ... 878

Accused : *See* WITNESS 720

Act 1859—XI : *See* REVENUE SALE LAW.

Act 1860—XLV : *See* PENAL CODE.

Act 1869—IV : *See* DIVORCE ACT.

Act 1870—VII : *See* COURT-FEES ACT.

Act 1872—I : *See* EVIDENCE ACT.

Act 1872—IX : *See* CONTRACT ACT.

Act 1873—X : *See* OATHS ACT.

Act 1877—I : *See* SPECIFIC RELIEF ACT.

Act 1882—IV : *See* TRANSFER OF PROPERTY ACT.

Act 1882—XIV : *See* CIVIL PROCEDURE CODE, 1882.

Act 1885—VIII : *See* BENGAL TENANCY ACT.

Act 1887—XII : *See* CIVIL COURTS ACT.

PAGE.

Act 1893—IV : *See* PARTITION ACT.

Act 1894—I : *See* LAND ACQUISITION ACT.

Act 1898—V : *See* CRIMINAL PROCEDURE CODE.

Act 1899—IX : *See* ARBITRATION ACT.

Act 1908—V : *See* CIVIL PROCEDURE CODE.

Act 1908—IX : *See* LIMITATION ACT.

Act 1911—II : *See* PATENTS AND DESIGNS ACT.

Act 1913—VII : *See* COMPANIES ACT.

Act 1914—VIII : *See* MOTOR VEHICLS ACT.

Administration—*Crown debt, priority of*—*Still-head duty*—*English mortgage of immoveables*—*Fixtures*—*Hypothecation of moveables and shares.* The owner of a distillery died, living a certain debt due to Government as still-head duty in respect thereof, as also two mortgages (in the English form) on the land and premises together with the buildings and structures thereon constituting the distillery, the first mortgage being in favour of the Alliance Bank of Simla, Ld., and the second in favour of the Delhi and London Bank, Ld. The moveables appertaining to the distillery were similarly hypothecated to the said Banks and certain shares registered in the deceased's name were hypothecated to and deposited with the Alliance Bank. *Held*, that so far as the immoveable properties were concerned including the fixtures, the Crown was not entitled to priority, that the Alliance Bank as first mortgagee ranked first, but the Delhi and London Bank as second mortgagee was not entitled

PAGE.

Administration—*concld.*

to priority over the Crown. *Dost Muhammad Khan* v. *Maniram*, I. L. R. 29 All. 537, *Rami Chandra* v. *Pitchai Kanni*, I. L. R. 7 Mad. 434, *Ibrahim Khan Sahib* v. *Rangasami Naicken*, I. L. R. 28 Mad 420, followed. *Mersey Steel and Iron Co.* v. *Naylor Benzon & Co.*, L. R. 9 Q. B. D. 648; L. R. 9 A. C. 434, *The Secretary of State for India* v. *Bombay Landing and Shipping Co.*, 5 Bom. H. C. R. (O. C.) 23, *Giles* v. *Grover*, 9 Bing 128, *The King* v. *Cotton*, (1751) Parker 112, *Ganpatputaya* v. *The Collector of Kanara*, I. L. R. 1 Bom. 7, *Puthia Valapil Barga* v. *Veloth Assenar*, I. L. R. 25 Mad. 733, *Gayanala Bala Dassee* v. *Butto Kristo Bairagi*, I. L. R. 33 Calc. 1040. *The Collector of Moradabad* v. *Muhammad Daim*, I. L. R. 2 All. 196, referred to. *Re Henley & Co.*, L. R. 9 Ch. D. 469, *New South Wales Taxation Commissioners* v. *Palmer*, [1907] A. C. 179, *Rex* v. *Wells*, 16 East 278, distinguished. So far as the moveable properties and the shares were concerned, the Alliance Bank did not have priority over the Crown. *Harrold* v. *Plenty*, [1901] 2 Ch. 314, followed. BANK OF UPPER INDIA *v.* THE ADMINISTRATOR-GENERAL OF BENGAL, I. L. R. 45 Calc. ... 653

Administration, suit for: *See* COURT-FEE 634

Admissibility: *See* DEPOSITION ... 823

Admission: *See* PARTIES 159

Adoption: *See* BURMESE BUDDHIST LAW 1

Adverse Possession: *See* LANDLORD AND TENANT 755

Affreightment, contract of: *See* SALE OF GOODS 28

Alienation: *See* HINDU LAW—REVERSIONER 590

Alternative Charge: *See* AUTREFOIS ACQUIT 727

Amendment of Plaint—*Practice and procedure—Suit on a mortgage—Omission to include claims on previous mortgage and charge—Inadvertence,*

PAGE.

Amendment of Plaint—*concld.*

and bonâ fide and erroneous impression as to jurisdiction—Right of appeal—Civil Procedure Code (Act V of 1908), O. II, r. 2. Where the Court on an application for amendment of plaint granted it without deciding the points urged but subject to any contention which the defendants might raise in answer to the claim as amended: *Held*, that it was better and more regular that the question of the right to amend the plaint should have been determined before the order was made, or if this would have involved a lengthy inquiry covering the same ground as the evidence in the suit, that the hearing of the application to amend should have been adjourned to the hearing of the suit and determined on the evidence then taken. The Court being desirous of getting at the true facts will allow an amendment subject to the three chief conditions: that there is good faith on the part of the applicant; possibility of amendment without such prejudice to the other party as cannot be compensated by costs; and, lastly, that the amendment is not such as to turn a suit of one character into a suit of another character. Order II, r. 2 of the Civil Procedure Code refers to a case where there has been a suit in which there has been an omission to sue in respect of portion of a claim and a decree has been made in that suit. In that case a second suit in respect of the portion so omitted is barred. In a case, where the suit has not been heard but a claim has been omitted by inadvertence, an amendment may be allowed. *Quære*: Whether there was an appeal or not from an order of amendment in this case. UPENDRA NARAIN ROY *v.* JANAKI NATH ROY (1917), I. L. R. 45 Calc. ... 305

Analogous Designs: *See* DESIGN ... 606

Annulment Proceedings, notice of: *See* LANDLORD AND TENANT ... 755

Appeal: *See* MISJOINDER 111

PAGE.

Appeal: *See* REVIEW 60

——— *See* SANCTION FOR PROSECUTION 336

———*Arbitration Award filed in Court—Application to set aside award—Arbitration Act (IX of 1899), s. 11 (2)—Civil Procedure Code Act (V of 1908), s. 104 (f)—Letters Patent, 1865, cl 15.* No appeal lies under s. 104 (*f*) of the Civil Procedure Code from an order refusing to set aside an award made and filed under the provisions of the Arbitration Act. s 104 (*f*) of the Civil Procedure Code does not apply to proceedings under cl. (2) of s. 11 of the Arbitration Act. The Court, however, has jurisdiction to hear the appeal under cl. 15 of the Letters Patent. CAMPBELL & Co. *v.* JESHRAJ GIRIDHARI LALL (1917), I. L. R. 45 Calc. 502

———*Dismissal for default—Order of Special Judge—Bengal Tenancy Act (VIII of 1885), ss. 106, 109A, sub-s. (2)—Civil Procedure Code (Act V of 1908), O. XLI, rr. 17, 19; O. XLIII, r. 1, cl. (t).* An appeal lies from an order refusing to rehear an appeal dismissed for default, even though such appeal has been preferred under s 109A, sub-s. (2), in a suit under s. 106 of the Bengal Tenancy Act. *Mothur Chandra Majumdar* v. *Tara Sunkar Ghose*, 7 C. W. N. 440, distinguished. MANMATHA NATH DEY *v* GADADHAR MANA (1917), I. L. R. 45 Calc. 638

———*Jurisdiction—Written statement, order refusing leave to file—"Judgment"—Letters Patent, 1865, cl. 15—Rules and Orders of High Court, Chap. XIV, r. 3.* No appeal lies from an order made by a Judge sitting on the Original Side, refusing an application by a defendant for leave to file his written statement. Such an order is not a "judgment" within the meaning of clause 15 of the Letters Patent of 1865. *The Justices of the Peace for Calcutta* v. *The Oriental Gas Company*, 8 B. L. R. 433, referred to. *Mathura Sundari Dasi* v. *Haran Chandra Saha*, I. L. R. 43 Calc. 857, distinguished MURALIDHAR CHAMARIA *v.* M. R. DALMIA, (1917) I. L. R. 45 Calc. ... 816

Appeal—*concld.*

PAGE.

———, **prosecution of:** *See* LIMITATION 94

———, **reversal on:** *See* ATTACHMENT BEFORE JUDGMENT 779

———, **right of:** *See* AMENDMENT OF PLAINT 305

——— **from Order:** *See* JURISDICTION ... 926

Appraisement Proceedings: *See* SANCTION FOR PROSECUTION 336

Arbitration: *See* APPEAL 502

——— **Act (IX of 1899), s. 11 (2):** *See* APPEAL 502

Arrears of Rent, suit for: *See* ILLEGAL CESS 259

Assignment of Equity of Redemption: *See* MORTGAGE 702

Attachment: *See* LIMITATION ... 784

——— **before Judgment**—*Suit dismissal of—Reversal on appeal—Termination of attachment—Private sale—Sale in execution of decree—Jurisdiction—Civil Procedure Code Act (V of 1908), s. 115; O. XXXVIII, rr. 9 and 11.* The Court should when dismissing a suit at the same time make the order directing the attachment before judgment to be withdrawn. But even if the order is not made, on the dismissal of the suit the attachment before judgment falls to the ground, whether an appeal is filed or not. *Sasirama Kumari* v. *Meherban Khan*, 13 C. L. J. 243, and *Ram Chand* v. *Pitam Mal*, I. L. R. 10 All. 506, referred to. Where the District Judge has directed property not under attachment to be sold without being first attached, the question raised is one which falls within the scope of s. 115 of the Civil Procedure Code. ABDUL RAHMAN *v.* AMIN SHARIF (1918), I. L. R. 45 Calc. ... 779

Attestation of Mortgaged Deed: *See* PARDANASHIN LADY 747

PAGE.

Autrefois Acquit—*Trial for theft and receiving stolen property charged in the alternative—Acquittal by the High Court—Subsequent trial under s. 54A of the Calcutta Police Act (Beng. IV of 1866) relating to the same act or series of acts—Act or possession punishable under s. 54A whether an offence—Criminal Procedure Code (Act V of 1898), ss. 4 (1) (o), 236, 237 and 403 (1).* Under s. 403 (1) of the Criminal Procedure Code an acquittal of offences under s 380 and s. 411 of the Penal Code, charged in the alternative, bars a subsequent trial for an offence under s. 54A of the Calcutta Police Act (Beng. IV of 1866), in respect of the same act, or series of acts which formed the subject of the previous trial; the case falling within *Illustration* (a) of s. 236 and the *Illustration* attached to s. 237 of the Criminal Procedure Code. *Queen-Empress* v. *Croft*, I. L. R. 23 Calc. 174 distinguished. An act or possession punishable under s. 54A of the Calcutta Police Act is an "*offence*" within s. 4 (1) (o) of the Code. MANHARI CHOWDHURI *v.* EMPEROR (1917), I. L. R. 45 Calc. ... 727

Award: *See* APPEAL 502

Balance Sheet: *See* COMPAY ... 486

Benamidar, right of: *See* EX PARTE DECREE 920

Bengal Tenancy Act (VIII of 1885)—*s. 5, sub-ss. (1), (4), (b) and (5) and s. 103 B—Status of tenant, whether tenure-holder or raiyat—Purpose for which land was acquired and extent of holding or tenure—Mode of determining status—Presumption of correctness of entry in Record of Rights—Rebuttal of, by proof of attendant circumstances showing incorrectness.* The defendant held more than 250 acres of land in a village which formed part of the plaintiff's zemindari in the district of Cuttack, under a lease granted by the plaintiff's predecessor in title in 1901 to a person who assigned it to the defendant in 1907. In proceedings taken

PAGE.

Bengal Tenancy Act (VIII of 1885)—*contd.*

to prepare the "Record of Rights" for the land covered by the lease, the defendant was entered as a tenure-holder, but on his objection the Assistant Settlement Officer recorded him as a "settled raiyat at a fixed rent." The lease was an ordinary reclamation lease of the land permanently to the lessee at a fixed rent "to make it fit for cultivation according to your will and you shall hold the same by cultivating it or having it cultivated, and you shall be competent to make such other arrangements or adopt such other convenient steps as you consider necessary for cultivating the same." In a suit brought under the provisions of section 106 of the Bengal Tenancy Act (VIII of 1885), for rectification of the entry by recording the defendant as tenure-holder: —*Held*, on the construction of the Act, that in determining the status of a tenant, whether he is a tenure-holder or a raiyat, what has to be considered is (a) the purpose for which the land was acquired, and (b) the extent of the tenure or holding. Fixity of rent was no criterion for the determination of that question, for a tenure may be held at a fixed rent equally with a raiyati holding. The statutory presumption under s. 5, sub-s. (5) applied to the defendant as holding more than 100 acres, and the purpose appeared to be that the land should not be cultivated by the personal agency of the defendant himself. Here the land was leased to a man of means, a resident of another place, for the purpose of reclaiming the land, and rendering it fit for cultivation, the agency to be employed for cultivating it being left to his discretion. The Courts were right in looking at the attendant circumstances to judge of the purpose for which the lease was acquired and to determine the status of the defendant. The presumption under s. 103 B that an entry in a "Record of Rights" finally

PAGE.

Bengal Tenancy Act (VIII of 1883)—*concld.*

published "shall be presumed to be correct until it is proved by evidence to be incorrect," was fully rebutted by the circumstances referred to by the majority of the Courts in India in arriving at the conclusion that the defendant was a tenure-holder and not a raiyat. DEBENDRA NATH DAS *v.* BIBUDHENDRA MANSINGH BHRAMARBAR ROY (1918) I. L. R. 45 Calc. ... 803

ss. 31A, 50 (*2*), 113 : 115 : *See* LANDLORD AND TENANT 930

ss. 40, 109 : *See* RENT ... 768

ss. 69, 70 : *See* SANCTION FOR PROSECUTION 336

s. 74 : *See* PESHKOSH 866

ss. 103B, 106 : *See* LAKHERAJ LANDS 574

ss. 104H, 111 A : *See* LIMITATION ... 645

ss. 104H (2), 184, 185 : *See* SUIT ... 934

ss. 106, 109A (2) : *See* APPEAL ... 638

ss. 159, cl. (*b*), 179 : *See* LEASE ... 940

ss. 161, 167: *See* LANDLORD AND TENANT 755

ss. 167, 169 : *See* SALE ... 151

Blindness : *See* HINDU LAW—INHERITANCE 17

Bombay City Improvement Act (Bom. IV of 1898), ss. 25, 29 : *See* RECOUPMENT 343

Bombay Regulation (IV of 1827), s. 26 : *See* CUSTOM 450

Breach of Contract : *See* SALE OF GOODS 28

British Baluchistan Regulation (IX of 1896), s. 10 : *See* RES JUDICATA 442

PAGE.

Brothel : *Order of Magistrate directing discontinuance of use of house as such —Jurisdiction of District Magistrate to stay Order—Eastern Bengal and Assam Disorderly Houses Act (II of 1907), ss. 2, 3.* The District Magistrate has no jurisdiction under the law to interfere with the order of a Criminal Court under s. 3 of the Eastern Bengal and Assam Disorderly Houses Act (II of 1907) and stay its operation. *Rajani Khemtawali* v. *King Emperor*, 14 C. W. N. 404, referred to. LALIT MOHAN CHAKRAVARTI *v.* HEMENDRA KUMAR DE (1917) I. L R. 45 Calc. ... 301

Burmese Buddhist Law—*Adoption—Kittima adoption—Publicity and notoriety essential—Forfeiture of adoption by kittima son separating from adoptive parents—Distinction where there are other children—Intention to break tie with adoptive parents—Contest between two claimants, each claiming the whole estate.* A child adopted under the Burmese Buddhist Law according to the fullest form of adoption, and retaining his status as an adopted child till the death of his adoptive parents, is entitled to inherit their estate as if he were a natural and lawful child, either in the absence of other children or in competition with them. Such a child is called a *kittima* child. There is no ceremony of adoption, and it is not necessary for one who claims adoption to point to any particular statement made or act done by his adoptive parents on a particular date. But on the other hand, the adoption must be a matter of publicity and notoriety. *Ma Me Gale* v. *Ma Sa Yi*, I. L. R. 32 Calc 219 ; L. R. 32 I. A. 72, and *Ma Ywet* v. *Ma Me*, I. L. R. 36 Calc. 978 ; L. R. 36 I. A. 192, followed. A *kittima* child may forfeit his right of inheritance by separating from his adoptive parents, this being considered an act of ingratitude : see the texts set forth in section 195 of Gaung's "Digest of Burmese Buddhist Law." These

PAGE.

British Baluchistan Regulation (IX of 1896)—*contd.*

authorities, however, draw a distinction between the cases where there are other children with whom the *kittima* child seeks to compete and share, and cases where he has no such competitor, and in the latter instance allow him to inherit in whole or in part notwithstanding his separation. The true principle on which the rule of forfeiture rests is that it is a matter of intention. The fact that the child goes to live apart is some evidence of an intention to break the bond; and it is easier to presume this where the adoptive parents have other children who can perform the duties and receive the estate. The extent of the separation is to be also taken into account. The distance may be so great as to render it impracticable for the child to continue to discharge duties to the adoptive parents, and in that case it probably works a a forfeiture. But if the distance be not great, if the separation of residence be with the consent of the adoptive parents, and if the child is ready and willing to discharge filial duties after this separation, the bond is not broken. This is the result of the modern decisions. Chan Toon's "Principles of Buddhist Law," 88 to 95 where the authorities are given, and *Maung Shwe Thwe* v. *Ma Saing*, 2 U. B. Rul. (1897—1901) 135, referred to. In this case where each of the parties claimed to be the sole adopted son of the same adoptive parents, and in that capacity to be entitled to succeed to their whole to the exclusion of the other :—*Held* (reversing the decision of the Chief Court), that on the evidence both the claimants were adopted heirs, and that, it not being contended for the appellant that there would be any legal objection to the widow adopting a second heir or that the position of a son so adopted would be in any way inferior to that of the first adopted son, they were both

PAGE.

British Baluchistan Regulation (IX of 1896)—*concld.*

entitled to inherit the estate. As in that case both of them had asked for too much, each should bear his own costs of the litigation. MAUNG THWE v. MAUNG TUN PE (1917), 1. L. R. 45 CALC. 1

C. I. F. Contract: *See* SALE OF GOODS ... 28

Calcutta Improvement Act (Beng. V of 1911), ss. 70, 71(*a*), (*c*), 77: *See* SANCTION FOR PROSECUTION ... 585

Calcutta Improvement Tribunal: *See* SANCTION FOR PROSECUTION ... 585

Calcutta Municipal Act (Beng. III of 1899), ss. 3 (*30*), 37 47, and Sch. IV, rr. 3, 8, (*1*): *See* MUNICIPAL ELECTION 950

—— **s. 357 (*2*)**: *See* RECOUPMENT ... 343

Calcutta Police Act (Beng. IV of 1866) s. 54: *See* AUTREFOIS ACQUIT ... 727

Cancellation of Registration: *See* DESIGN 606

Capture of Vessel: *See* SALE OF GOODS 28

Cargo, release of: *See* SALE OF GOODS 28

Cause of Action, survival of: *See* PARTIES 860

Causes of Action:—*See* MISJOINDER ... 111

Chairman, decision of:—*See* Municipal Election 950

Chaukidari Chakaran Lands—*Effect of transfer—Village Chaukidari Act (Beng. VI of 1870), s. 51.* Where certain chaukidari chakran lands forming part of a revenue-paying estate, being abandoned by the chaukidars, were appropriated by the zemindar who settled the same with the defendants as tenants, and thereafter the lands were resumed under the provisions of the Village Chaukidari Act, 1870, and subsequently transferred to the zemindar who granted an under-tenure to the plaintiff: *Held*, that the plaintiff could not contend that the defendants, who were brought on the land by his grantor, were trespassers, and the plaintiff's suit in ejectment must fail. *Ranjit Singh Bahadur* v. *Kali Dasi*

PAGE.

Chaukidari Chakaran Lands—*contd.*

Debi. 21, C. W. N. 609, referred to. SHIB CHANDRA BANERJEE *v.* SURENDRA CHANDRA MANDAL (1917) I. L. R. 45 Calc. 515

———*Included in revenue-paying estate—Resumption of, and transfered to landlord—Village Chaukidari Act (Beng. VI of 1870)—Sale of parent estate for default of payment of Government revenue—Revenue Sale Law (Act XI of 1859)—Title of purchaser.* Where chaukidari chakaran lands resumed by Government under the provisions of the Village Chaukidari Act, 1870, were transferred in 1900 to A in consequenee of whose default in paying Government revenue, the parent estate was sold in 1907 and purchased by B, and where B sued to recover possession of the same : *Held*, that the purchaser at the revenue sale acquired no title to the chaukidari chakaran lands which were never put up to sale for realization of the arrears due from the remainder of the estate. *Ranjit Singh* v. *Kali Dasi Debi*, I. L. R. 44 Calc. 841 ; 21 C. W. N. 609, followed. *Kazi Newaz Khoda* v. *Ram Jadu Dey*, I. L. R. 34 Calc. 109 ; 11 C. W. N. 201, *Harreck Chand Babu* v. *Charu Chandra Sinha*, 13 C. L. J. 102 ; 15 C. W. N. 5, *Rakhal Das Mukerjee* v. *Madhab Chandra Sinha*, 13 C. L. J. 109, referred to. *Kasim Sheik* v. *Prasanna Kumar Mukerjee*, I. L. R 33 Calc. 596 ; 10 C. W. N. 598, dissented from. BROJENDRA LALL DAS *v.* DEB NARAIN TEWARI (1917), I. L. R. 45 Calc. 764

———*Resumption—Putni lease—Transfer to landlord—suit for recovery of possession with mesne profits—Village Chaukidari Act (Beng. VI of 1870), s. 51.* Where A obtained a putni of two villages from Z, paid a bonus and the annual rent was fixed in perpetuity, and where within the lands comprised in the putni were some chaukidari chakran lands which were

PAGE.

Chaukidari Chakaran Lands—*concld.*

subsequently resumed by Government and transferred to Z, who settled the same with tenants, and where A, the putnidar, instituted a suit for declaration of tittle and recovery, of possession with mesne profits : *Held*, that on equitable grounds, the putnidar and the zemiudar must be placed in the position they would have occupied if the chaukidari chakaran lands had been resumed before the putni was created ; the assets of those lands would then have been taken into account in settling the amount of putni rent which would have represented the assessment due to the State, as also a fair share of the profits. *Held*, also, that mesne profits were to be calculated on the basis of the rent payable by the tenants to the zemindar and not on that of the actual value of the land produce. *Ranjit Singh* v. *Kali Dasi Debi*, 21 C. W. N. 609, *Kazi Newaz Khoda* v. *Ram Jadu Dey*, I. L. R. 34 Calc. 109. *Rajendra Nath Mukherjee* v. *Hira Lal Mukherjee*, 14 C. W. N. 995, *Gopendra Chandra Mitter* v. *Tara Prasanna Mukherjee*, 14 C. W. N. 1049, *Harak Chand Babu* v. *Charu Chandra Singha*, 15 C.W.N. 5, referred to. MEHDI HOSSEIN *v.* UMESH CHANDRA MOOKERJEE (1917), I. L. R. 45 Calc. 685

Civil and Criminal Contempt:—*See* CONTEMPT OF COURT 169

Civil Courts Act (XII of 1887), s. 21, Cl. (i): —*See* Jurisdiction 926

Civil Procedure Code, 1882, s. 13:—*See* RES JUDICATA 442

———**(Act XIV of 1882), ss. 366, 363, 371**:—*See* LIMITATION ... 94

———**503, 505**:—*See* LEASE ... 940

———**(Act V of 1908), s. 80**:—*See* SUIT... 934

———**ss. 99, 100, 108**:—*See* JURISDICTION ... 926

PAGE.

Civil Procedure Code, (Act V of 1906), s. 102:—*See*—POSSESSORY SUIT ... 519

——————**s. 104 (f)**: —*See* APPEAL 502

——————**s. 115; O. XXXVIII, rr. 9, 11**:—*See* ATTACHMENT BEFORE JUDGMENT 779

——————**s. 132 cl. (i)**:—*See* EXAMINATION ON COMMISSION 697

——————**ss. 132, 133**:—*See* EXAMINATION ON COMISSION 492

——————**O. I, rr. 1, 3; O. II, r. 3**: *See* MISJOINDER 111

——————**O. II, r. 2**: —*See* AMENDMENT OF PLAINT ... 305

——————**O. XII, r. 6**: *See* COMMISSION AGENCY ... 138

——————**O. XIII, r. 1**:—*See* MAHOMEDAN LAW—MARRIAGE 878

——————**O. XVIII, rr. 5, 6**:—*See* DEPOSITION ... 823

——————**O, XXI, r. 2 (3)**:—*See* LIMITATION 630

——————**O. XXI, rr. 58, 63**:—*See* LIMITATION... ... 784

——————**O. XXII**:— *See* PARTIES 860

——————**O. XXIV, r. 6**:—*See* MORTGAGE 702

——————**O. XXXIV, rr. 14, 15**:—*See* EXECUTION OF DECREE 530

——————**O, XLI, rr. 17, 19**:—*See* APPEAL ... 638

——————**O. XLIII, r. 1 (w); O. XLVII, rr. 1, 4, 7, 8**:— *See* REVIEW 60

Claim Proceeding:—*See* LIMITATION ... 784

Co-respondent, absence of:—*See* DIVORCE 525

Collusion:—*See* EX PARTE DECREE ... 920

Commision Agency:—*Suit for recovery of amount due in respect of Commission Agency—Practice and Procedure—Adjustment of accounts—Part of claim admitted by the defendant—Judgment on admissions—Liberty to plaintiff to prove balance of claim—Jurisdiction of Court—Discretionary powers—Civil Procedure Code (Act V of 1908), O. XII, r. 6.* Under O. XII, rule 6 of Civil Procedure Code, the Court has jurisdiction to enter judgment for the amount admitted to be due from the defendants to the plaintiffs and it is in the Judge's discretion, having regard to the nature of the case and the allegation coutained in the pleading and the admission made in Court, whether he will allow the plaintiffs to proceed to prove the remainder of their claim. The discretion of the Judge is judicial, and an erroneous exercise thereof may be open to correction by a Court of Appeal, which, however, will be slow to interfere unless either of the parties has been manifestly and unfairly prejudiced. PREMSUK DAS ASSARAM *v.* UDAIRAM GUNGABUX (1917) I. L. R. 45 Calc. 138

Commutation: *See* RENT 768

Companies Act (VII of 1913) s. 32 (4): *See* COMPANY 490

Companies Act (VII of 1913) ss. 76, 131, 134: *See* COMPANY 486

Company—*Annual list of members, and summary—Omission of director to file same with Registrar—Liability of director under Indian Companies Act (VII of 1913) s. 32 (4)—Place where default committed—Jurisdiction of Presidency Magistrate to try offence—Criminal Procedure Code (Act V of 1898) ss. 182, 531.* The director of a company is liable, under s. 32 (4) of the Indian Companies Act (VII of 1913) for default in filing a copy of the annual list of members and the summary prescribed therein, in the office of the Registrar of Joint Stock Companies at Calcutta. A Presidency Magistrate has jurisdiction to try such offence under s. 182 of the Criminal Procedure Code, and even if not,

PAGE.

Company—*concld.*

s. 531 cures the defect. DEBENDRA NATH DAS GUPTA *v.* REGISTRAR OF JOINT STOCK COMPANIES (1917) I. L. R. 45 Calc. 490

Company—*Balance sheet of a company—Omission of director to call annual general meeting and to place before it a properly audited balance sheet—Liability of director for default in filing copy of the same—Indian Companies Act (VII of 1913), ss. 76, 131, 134—Jurisdiction.* The director of a company is liable, under s. 134 (*4*) of the Indian Companies Act (VII of 1913), for default in filing a copy of the annual balance sheet duly prepared and audited, in the office of the Registrar of Joint Stock Companies at Calcutta, and can not plead, in answer to a charge under s. 134, his own omission to call the annual general meeting of the Company required by s. 76, and to place before it such balance sheet. *Park v. Lawton*, [1911] 1 K. B. 588, referred to. The offence under s. 134 (*4*) is triable in Calcutta, whether or not, if the prosecution had been laid under s. 76 or 131 of the Act, the Presidency Magistrate might have had jurisdiction to try the offences committed under the latter sections. DEBENDRA NATH DAS GUPTA v. REGISTRAR OF JOINT STOCK COMPANIES, (1917) I. L. R. 45 Calc. 486

Compromise—*Petition of compromise presented to the Magistrate while writing judgment—Duty of Magistrate to accept and give effect to the petition—Criminal Procedure Code (Act V of 1898) s. 345.* Under s. 345 of the Criminal Procedure Code, a case may be compounded at any time before sentence is pronounced. A Magistrate, therefore, cannot refuse to accept a petition of compromise presented to him whilst he is writing the judgment. ASLAM MEAH *v.* EMPEROR (1917) I. L. R. 45 Calc. 814

PAGE.

Compromise, by Female Owner: *See* HINDU LAW REVERSIONER ... 590

Computation of Time: *See* CONTRACT FOR SALE 481

Condemnation of Vessel: *See* SALE OF GOODS 28

Confession: *See* MISDIRECTION ... 557

Congenital Blindness: *See* HINDU LAW—INHERITANCE 17

Consideration—*Mortgage—Legal consideration—Contract Act (IX of 1872,) s. 2 cl. (d).* Where A executed a mortgage in favour of X in 1884, and in consideration of X not enforcing the same and, in substitution therefor, A, along with B, C, and D executed a fresh mortgage in 1893, in favour of X, and on X suing to enforce the later mortgage the Court of first instance dismissed the suit on the ground that there was no legal consideration: *Held*, that the mortgage of 1893, which replaced that of 1884, was for legal consideration. *Held*, further, that it was not necessary that the promisor should benefit by the consideration, it was sufficient if the promisee did some act from which a third person was benefited, and which he would not have done but for the promise. *Hurkissen Dass Serowgee v. Nibaran Chander Banerjee*, 6 C. W. N. 27. *Alhusen v. Prest*, 6 Exch. Rep. 720, *Bailey v. Croft*, 4 Taunt. 611, *Haig v. Brooks*, 10 A. & E. 309, referred to. FANINDRA NARAIN ROY *v.* KACHEMAN BIBI, (1917) I. L. R. 45 Calc. ... 773

Construction: *See* CONTRACT FOR SALE ... 481

Contempt of Court—*Civil and Criminal Contempt—Court of Record—Prosecution by Judges—Trial by the same Judges—Jurisdiction—Standard of proof—Fair comment—Publication—Printer, liability of—Manager and Directors of Newspaper Company, liability of—Evidence Act (I of 1872), ss. 3, 74 (2)—Editor registration of.* Where a newspaper unlawfully published articles scandalising the High Court and the Chief

PAGE.

Contempt of Court.—*contd.*

Justice in his admission thereof, by allegations implying that the Chief Justice had constituted a packed Bench, the articles having a tendency to prejudice the parties and interfere with the administration of justice :—*Held per* CURIAM (MUKERJEE J. discussing whether contempt proceedings were civil or criminal), that the Judges had jurisdiction to hear the Rule though issued of their own motion : that the articles constituted a contempt of Court : that the printer of the newspaper was liable therefor : that there was no sufficient evidence of the existence of an editor, that the *prima facie* case of responsibility for the publication against two of the directors and the managers of the company owning the newspaper had been met and that in the case of the third director, although the facts raised a case of strong suspicion against him, it was just possible he might not be responsible for the publication and that he should be given the benefit of the doubt. The Rule was therefore made absolute against the printer, who was fined, and discharged as regards the other respondents. The Legislature should provide for the registration of the editor or the person really responsible for the contents of a newspaper. *Per* WOODROFFE J. There is only one Standard of Proof applicable alike to civil and criminal trials, *vide* definition of "proved" and "disproved" in s. 3 of the Evidence Act. The word record includes a collection of private documents. *The Queen* v. *Gray*, [1900] 2 Q. B. 36, *Surendra Nath Banerjee* v. *The Chief Justice and Judges of the High Court at Fort William in Bengal*, I. L. R. 10 Calc. 109 ; L. R. 10 I. A. 171, *Legal Remembrancer* v. *Mati Lal Ghose and Others*, I. L. R. 41 Calc. 173, *McLeod* v. *St. Aubyn*, [1899] A. C. 549, *The American Exchange in Europe Case* 58 L. J. Ch. 706, *St. James Evening Post Case*, 2 Atk. 469, *Daw* v. *Eley*, L. R. 7 Eq. 49, *In re Banks and Fenwick*, 26 C. L. J. 401, *Cheshire* v. *Strauss*, 12 T. L. R. 291, *Reg.* v. *Judd*, 37 W. R. (Eng.) 143, *Exparte Green* 7 T. L. R. 411, *Weston* v. *Peary Mohan Dass*, I. L. R. 40 Calc. 898, referred to. MOTI LAL GHOSE AND OTHERS, *In re*, (1917) I. L. R. 45 Calc. 169

Contentious Matter : *See* PARTIES ... 860

Contract : *See* PESHKOSH 866

Contract Act (IX of 1872) s. 2, cl. (d):
See CONSIDERATION 773

s. 56: *See* SALE OF GOODS ... 28

ss. 69, 70:
See CONTRIBUTION, SUIT FOR ... 691

Contract for Sale—*Construction—Computation of time—"Up to" Wednesday—'Until"—Evidence Act (I of 1872), s. 91—Oral evidence.* On 12th May 1917, the defendant offered to sell his motor-car to the plaintiff company in these words : "Nevertheless, I am willing to hand over the Morscar to you against a cheque for Rs 3,120. . . . As I intend advertising the car unless you wish to have it, please understand that my offer only holds good *up to Wednesday* next, as the time I have is limited." The plaintiff company sometime on Wednesday, the 16th May, tendered Rs. 3,120 to the defendant and asked for delivery of the car, in accordance with the offer of the 12th May. The defendant, however, refused the tender contending that his offer expired on Tuesday, the 15th May :—*Held*, that upon the true construction of the letter of the 12th May and the words "up to Wednesday," the offer remained open until midnight on Wednesday, and did not expire at midnight on Tuesday. *The King* v. *Stevens*, 5 East 244, *Bellhouse* v. *Mellor*, 4 H. & N. 116, *Isaacs* v. *Royal Insurance Co.*, L. R. 5 Ex. 296,

PAGE.

Contract of sale.—*concld.*

and *Rogers* v. *Davis*, 8 Ir. L. R. 399, considered. METROPOLITAN ENGINEERING WORKS v. DEBRUNNER (1917) I. L. R. 45 Calc 481

Contribution, suit for—*Contract Act (IX of 1872) ss. 69, 70.* X, a mortgagee, obtained a decree against A, B and C as representatives in interest of his mortgagor. A satisfied the decree-holder in full, and instituted a suit for contribution against B and C for recovery of two-thirds of the money. B and C denied that A had any interest in the mortgaged property, and urged that his payment was voluntary. The Court of first instance found, on the evidence, that A had an interest in the property, but the lower Appellate Court dismissed the suit holding that A had none. *Held*, that a payment in satisfaction of a decree, by a person who is a party to the decree and was bound thereby, was a payment made lawfully within the meaning of s. 70 of the Indian Contract Act. *Bindubasini Dasi* v. *Harendralal Roy*, I. L. R. 25 Calc. 305, *Radha Madhub Samonta* v. *Sasti Ram Sen*, I. L. R. 26 Calc. 826, discussed *Desai Himat Singji* v. *Bhavabhai Khayabhai*, I. L. R. 4 Bom. 643, *Jinnat Ali* v. *Fateh Ali Matbar*, 13 C. L. J. 646; 15 C. W. N. 332, distinguished. SERAFAT ALI *v.* ISSAN ALI (1917), I. L. R. 45 Calc. ... 691

Controller, jurisdiction of: *See* DESIGN 606

Costs: *See* EXAMINATION ON COMMISSION 492

Court-fee—*Suit for administration or account—Valuation for purposes of court-fees—Jurisdiction—Court fees Act (VII of 1870), s. 7, cl. IV (f).* In an administration suit valued at Rs. 30,000 for purposes of jurisdiction, and at Rs. 100 for adjustment of account, and wherein court-fees were paid on the latter sum only, together with Rs. 10 for the approximate value of the claim for account. *Held*, that such a suit was in essence a suit for account within the meaning of s. 7, cl. IV (*f*) of the Court-

PAGE.

Court-fee—*concld.*

fees Act, and that adequate court-fees had been paid on the plaint which could not be rejected. *Khatija* v. *Shekh Adam Husanally Vasi*, I. L. R. 39 Bom. 545, *Sasi Bhushan Bose* v. *Maharaja Sir Manindra Chandra Nandy*, 24 C. L. J. 448, *Satya Kumar Banerjee* v. *Satya Kripal Banerjee*, 10 C. L. J. 503, followed. SARAJU BALA DASI *v.* JOGEMAYA DASI (1917) I. L. R. 45 Calc 634

Court fees Act (VII of 1870) s. 7, cl. IV (f): *See* COURT-FEE 634

Court of Record: *See* CONTEMPT OF COURT 169

Covenant, breach of: *See* EJECTMENT ... 469

Criminal Procedure Code (Act V of 1898), ss. 4 (l) (o), 236, 237, 403 (1): *See* AUTREFOIS ACQUIT 727

s. 100: *See* SEARCH WARRANT ... 905

ss. 154, 298: *See* MISDIRECTION ... 557

ss. 182, 531: *See* COMPANY ... 490

s. 195: *See* SANCTION FOR PROSECUTION 585

s. 195 (6), (7) (b) (c): *See* SANCTION FOR PROSECUTION 336

s. 342 (4): *See* WITNESS ... 720

s. 345: *See* Compromise ... 814

Crown debt, priority of: *See* ADMINISTRATION 653

Custom—*Custom and usage—Origin of custom—Existence from time immemorial—Grant purporting to create family-custom—Proof of long line of succession.* Where by a confirmatory grant, dated the 4th February 1797, a Raja, after confirming a previous grant of a similar nature by his predecessor, gave to a Rani certain properties as *Joutuk Ranian Britti* and laid down in the sanad of grant

PAGE.

Custom—*contd.*

that she and the future Ranis were not entitled to sell or make a gift of the *Britti* but to enjoy the profits only for life, and prescribed a rule of succession to the effect that only Ranis of the family were to succeed to the properties for life, and no Rajas could claim or alter the course of succession as aforesaid :—*Held*, that the grant, in so far as it laid down a rule of succession, was absolutely void, as it prescribed a right of succession unknown to Hindu Law. It was also void as it purported to create successive life estates in favour of unborn persons, the estate itself being undisposed of. Even if the rule of succession laid down in the sanad of 1797, had actually been followed, it could not be treated as binding upon the family unless it had ripened into a family custom. *Held*, also, that in order to establish a custom it must be shown that the custom had existed from time immemorial, and where the custom set up was peculiar only to a single family the rule was more strictly enforced than ever. A family custom of proved antiquity was entitled to be recognised by the Courts, irrespective of the position and rank of the family, but where the origin of custom was known it must be shown that there had been a long line of succession in accordance with the usage. *Samrun Singh* v. *Khedun Singh*, 2 S. D. A. Sel. Rep. 116, *Pertab Deb* v. *Surup Deb Raikut*, 2 S. D. A. Sel. Rep. 249, *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar*, 12, B L. R. 396 ; 14 Moo. I. A. 570, *Garuradhwaja Prasad Singh* v. *Superundhwaja Prasad Singh*, I. L. R. 23 All. 37 ; L. R. 27 I. A. 238, *Prince Mahomed Buktyar Shah* v. *Rani Dhojamani*, 2 C. L. J. 20, referred to. AMBALICA DASI *v.* APARNA DASI (1918), I. L. R. 45 Calc. 833

Custom—*Proof of custom modifying Mahomedan Law—Custom excluding women from share of inheritance of paternal relation—Bombay Regulation IV of 1827, s. 26—Punjab Laws Act, 1872, s. 5—Essentials in proving custom—Family custom—Position and relationship of members of family—Denial by prominent member of family of existence of custom—Failure to produce Revenue Records as evidence.* On the death of a wealthy Shia Mahomedan in Sind, intestate and leaving no widow or child, the nearest surviving relations were a nephew (the plaintiff-appellant) and a sister and her son, the first and second defendants-respondents. The appellant's case was that the question as to the rights of inheritance was governed, not by Mahomedan Law, but by a custom which excluded women from any share in the inheritance of a paternal relation :—*Held*, that under section 26 of Bombay Regulation IV of 1827, which had been extended to Sind, no presumption can be made in favour of the existence of a usage or custom where it is known that such usage or custom is prevalent, but it was incumbent on the appellant to allege and prove the custom on which he relied. *Daya Ram* v. *Sohel Singh*, 41 Punj. Rec 390, per ROBERTSON J., is a case under section 5 of the Punjab Laws Act, 1872, the words of which are more strongly in favour of the appellant's contention than those of section 26 of Bombay Regulation IV of 1827. Custom binding inheritance in a particular family has long been recognised in India : see *Soorendro Nath Roy* v. *Heeramonee Burmoneah*, 12 Moo. I. A. 81 ; and the principles applicable to the proof of customs in England were not to be applied in considering such a custom as that claimed in the present suit. Nor was it necessary to reject as useless for proving such a custom all the instances mentioned by CROUCH J. in his judgment in the Judicial Commissioner's Court. An example of each of the conditions there laid

PAGE.

Custom—*contd.*

down ought certainly to be established by some witness, but it was not necessary that all should be proved in every case, as that might greatly weaken the evidence by tradition to which in a custom of the character under consideration great weight was due. *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar*, 14 Moo. I. A. 570, referred to, as to what was essential to the proof of special usages modifying the ordinary law of succession. *Held*, also, assuming that the custom relied on, which had not been precisely defined by the appellant, was a custom by which in the event of intestacy daughters of the deceased were excluded in favour of their brothers, and sisters in favour of male paternal relations, that such a custom had not on the evidence been sufficiently proved The position and relationship of the different members of the family must always be considered in determining whether claims were not met because the rights to which they related did not exist, or whether they were put on one side because in the circumstances there was no need for asserting them. *Mirabivi* v. *Vellayanna*, I. L. R. 8 Mad. 464, referred to. The fact that prominent members of the families concerned denied that such a custom as alleged existed, and the non-production of the Revenue Records, one of which showed a division according to Mahomedan Law, and not according to the custom here set up, were both evidence strongly against the custom. In the opinion of their Lordships though there was much in history for the custom, and some evidence by which it received support, yet on the whole the evidence fell short of the standard to which it must attain in order to succeed in altering the devolution of property according to Mahomedan Law, to a devolution determined by a family custom.

PAGE.

Custom—*concld.*

ABDUL HUSSEIN KHAN *v.* SONA DERO (1917), I. L. R. 45 Calc. ... 450

———*Uncertainty—Inundated lands—Remission of rent.* Where in a suit for rent, the tenants set up a custom of total remission of rent on the ground that a certain portion of the land was subject to inundation resulting in the destruction of crops, the extent of such destruction not being specific, and that crops were so destroyed during one of the years for which rent was claimed: *Held*, that such custom was both unreasonable and uncertain and, consequently, unenforceable in law. *Tyson* v. *Smith*, 9 A. & E. 406, *Mahamaya Debi* v. *Haridas Haldar*, I. L. R. 42 Calc. 455, *Salisbury* v. *Gladstone*, 9 H. L. C. 692, referred to. SHIBNARAIN MOOKERJEE *v.* BHUTNATH GUCHAIT (1917), I. L. R. 45 Calc. ... 475

Custom or Usage—*Facts proving existence of custom or usage whether questions of law—Actual proof thereof question of fact—Second Appeal.* The question whether the facts found in any given instance prove the existence of the essential attributes of a custom or usage is a question of law which may be discussed in second appeal; the question whether such a state of facts has been proved by the evidence is merely a question of fact. *Kakarla Abbayya* v. *Raja Venkata Papayya Rao*, I. L. R 29 Mad. 24, dissented from. KAILASH CHANDRA DATTA *v.* PADMAKISORE ROY (1917), I. L. R. 45 Calc. 285

Darpatni, conditions in: *See* LEASE ... 940

Date of Sale: *See* SALE 151

Declaratory Decree—*Execution by Hindu widow, in possession of her husband's estate, of deed purporting to confer absolute interest in property to one reversioner to the exclusion of others—Right of excluded reversioners to declaration that the deed is not binding on them—Specific Relief Act (I of 1877), s. 42, ill (e).* Where a Hindu widow (defendant 1), in

PAGE.

Declaratory Decree—*concld.*

possession of her husband's estate, had executed a deed purporting to confer the absolute interest in the property on one of the reversioners (defendant 3) to the exclusion of others who claimed to be also reversionary heirs (plaintiffs): *Held*, that under section 42, illustration (*e*) of the Specific Relief Act (I of 1877), the plaintiffs, who as heirs ranked equally with defendant 3, were entitled to a declaration that the deed was not binding on them, notwithstanding that they may never get any title because events may preclude them from doing so, and though such a declaration involves a finding that the plaintiffs are reversionary heirs *Janaki Amal* v. *Narayanasami Aiyer*, I. L. R. 39 Mad. 634; L. R. 43 I. A. 207, distinguished. SAUDAGAR SINGH *v.* PARDIP NARAYAN SINGH (1917), I. L. R. 45 Calc. 510

Decree-holder, status of: *See* SALE ... 294

Default, in filing Annual List of Members: *See* COMPANY 490

Deposition—*Admissibility of deposition when not taken in accordance with law on subsequent trial for abetment of forgery and of user—Deposition signed by Judge and witness—No cross-examination on the point at the trial—Presumption of compliance with the law—Civil Procedure Code (Act V of 1908)—O. XVIII, rr. 5, 6—Evidence Act (I of 1872) ss. 80, 91.* The provisions of O. XVIII, rr. 5 and 6 of the Civil Procedure Code (Act V of 1908) are directory, and non-compliance therewith does not render the deposition inadmissible on a subsequent trial of the deponent either for giving false evidence or for abetment of forgery and of dishonest user of a bond proved by him in the course of a civil suit. *Empress* v. *Mayadeb Gossami*, I. L. R. 6 Calc. 762, *Kamatchinathan Chitty* v. *Emperor*, I. L. R. 28 Mad. 308, and *Emperor* v. *Jogendra Nath Ghose*, I. L. R. 42 Calc. 240, commented on. *Bogra* v. *Emperor*, I. L. R. 24 Mad. 141, approved. If a deposition has not been read over to the witness, in the presence of the presiding Judge, it does not prove itself under s. 80 of the Evidence Act, but it may still be proved in some other way, *e.g.*, by the Judge who recorded it or by the admission of the deponent. Section 91 of the Evidence Act, even if it covers deposition, merely excludes oral evidence of its contents, but does not make the document inadmissible in evidence, nor does it deal with the question of its mode of proof otherwise Where the deposition bore the signatures of the presiding Judge and of the deponent in his own vernacular, and the Judge and a pleader for the defendant, on whose behalf the appellant had deposed, were examined at the Sessions trial, but not cross-examined by the latter to show that the deposition had not been read over to him in the presence of the presiding officer, and there was nothing to the contrary on record of the Sessions trial:—*Held*, that the inference was that the deposition had been so read over to the deponent. *Per* BEACHCROFT J. A. Court is not precluded from ascertaining from the document itself what is in it merely because the contents may not in fact be correct. Failure to ensure the accuracy of the record may create doubt as to the correctness of its contents, but does not affect its admissibility when it is otherwise proved. ELAHI BAKSH KAZI *v.* EMPEROR (1918), I. L. R. 45 Calc. 823

Design—*Wrist-watch band—Registration—Application by outside party to expunge—Cancellation of registration by Controller—Jurisdiction of Controller—New and original design—Shape and configuration—Ornamentation and utility—Analogous designs—Different purposes and dissimilar use—Motion to the High Court by registered proprietor—Other specific and*

PAGE.

Design—*contd.*

adequate legal remedy available—Specific Relief Act (I of 1877), s. 45—Patents and Designs Act (II of 1911), ss. 62, 64, 67. G registered a design for a wrist-watch band, which he called the "Novelty" band. Subsequently Messrs. B. & Co. copied the design and on threat of legal proceedings by G, applied to the Controller of Patents and Designs under s. 62 of the Patents and Designs Act for an order to remove the design from the register. This the Controller did after having issued notice on G and having heard both parties. G then in an application, entitled "In the matter of section 45 of the Specific Relief Act and in the matter of the Indian Patents and Designs Act, 1911," moved the High Court for an order that the Controller had no jurisdiction to remove the registration of the design and that he should be required to restore the design to the register on the ground that the design was new and original. The Court dealt with the matter under s. 64 of the Indian Patents and Designs Act and discharged the Rule, Messrs. B. & Co. contending that the design in question had been anticipated by a bracelet produced by Messrs. C. & K. On appeal by the petitioner:—*Held*, that the Controller had no jurisdiction to cancel the registration, and under the Act the proper and ordinary way of expunging the registration of a design was to apply to this Court under s. 64 of the Patents and Designs Act. *Held*, also, that section 62 of the Patents and Designs Act was limited to applications by the registered proprietor, or by some person in whom his interest was vested, and the action of the Controlle was not justified by that section. *Held*, also, that the Court had no power to revise the Controller's decision under s. 64. *Held*, also, that this application, which was made under section 45 of the specific Relief Act, was not barred by section 64

PAGE.

Design—*concld.*

of the Patents and Designs Act. *Held*, also, that the application of the shape of the "Novelty" band to a watch to be worn on the wrist was for a purpose so different from and for a use so dissimilar to the purpose of the bracelet, that the design in question might be said to be original. *Per* SANDERSON C. J. The shape and configuration of the metal band taken by itself cannot be said to be new or original. *Per* WOODROFFE J. A wrist band used to carry an ornament such as that produced by Messrs. Cooke and Kelvy and a wrist band to carry a watch do not appear to me to be so analogous as to deprive the applicant of his claim to novelty. Further, the band is original and differs from the other band produced, by its circular shape, according to which it passes at the back of the watch, and as a consequence of that produces a flattening. GAMMETER *v.* THE CONTROLLER OF PATENTS AND DESIGNS, (1917) I. L. R. 45 Calc 606

Director, liability of: *See* COMPANY 486, 490

Discovery: *See* MISDIRECTION ... 557

Discovery: *See* REVIEW 60

Dismissal for Default: *See* APPEAL ... 638

Dismissal of Suit: *See* ATTACHMENT BEFORE JUDGMENT 779

Dispute as to Ownership: *See* WAJIB-UL-ARZ 791

Divorce—*Co-respondent, absence of—Leave of Judge for dispensing with co-respondent, when to be obtained—Jurisdiction of Court. in case of want of such leave—Matrimonial Causes Act of 1857 (20 & 21 Vict. c. 85), s. 28—Divorce Court Rules (English) 4, 5 and 6—Indian Divorce Act (IV of 1869), ss. 7, 11.* Where the husband was petitioner for divorce but could not name the alleged co-respondents (the Master having issued citations), and at the hearing applied for leave to dispense with the co-respondents: *Held*, that the direction for such leave must be by application to

PAGE.

Divorce—*concld.*

the Judge on motion founded on affidavit *before the hearing* of the petition. *Held*, further, that the Court had no jurisdiction to entertain the petition where such leave had not been obtained Cox *v.* Cox (1910), I. L. R. 45 Calc. 525

Divorce Act (IV of 1869), ss. 7, 11: *See* DIVORCE 525

Divorce Court Rules (English), 4, 5, 6: *See* DIVORCE 525

Documentary Evidence: *See* MAHOMEDAN LAW—MARRIAGE 878

Eastern Bengal and Assam Disorderly Houses Act (II of 1907) ss. 2, 3: *See* BROTHEL 301

Editor of Newspaper, registration of: *See* CONTEMPT OF COURT ... 169.

Ejectment— *Lease, forfeiture of—Transfer of Property Act (IV of 1882), s.* 111, *cl.* (*g*)—*Breach of covenant—Determination of lease, overt act necessary for—Waiver*, Where the rights and obligations of the parties regulated by s. 111. cl. (*g*) of the Transfer of Property Act, there is no determination of a lease by forfeiture immediately on breach of covenant, but such breach must be followed by an overt act on the part of the lessor before the tenancy can be deemed to have determined in the eye of the law. *Anandamoyee* v. *Lakhi Chandra Mitra*, I, L. R. 33 Calc. 339 ; 3 C. L. J. 274, *Kadir Baksh* v. *Prag Narain*, 9 All. L. J. 794, followed. *Held*, further, that the institution of a suit for ejectment cannot be rightly regarded as the requisite act to show the intention of the landlord to determine the lease within the meaning of s. 111, cl. (*g*). The forfeiture must be completed and the lease determined before the commencement of the action for ejectment. *Deo Nandan Pershad* v. *Meghu Mahton*, I. L. R. 34 Calc. 57, referred to. NOWRANG SINGH v. JANARDAN KISHOR LAL SINGH (1917) I. L. R. 45 Calc. ... 469

Election Roll: *See* MUNICIPAL ELECTION 950

PAGE

Enemy Vessel: *See* SALE OF GOODS ... 28

Enhancement of Rent, ground for: *See* LANDLORD AND TENANT ... 930

Equity of Redemption, assignment of, to Sureties: *See* MORTGAGE ... 702

Evidence: *See* MAHOMEDAN LAW—MARRIAGE 878

———: *See* WAJIB-UL-ARZ ... 791

Evidence, admissibility of:—*Evidence Act (I of 1872), s. 92—Evidence of acts and conduct of parties to deeds showing that they were mortgages when in form they were absolute transfers—Fraudulent dealing with property which the parties knew belonged to a third person not a party to deeds.* The language of s. 92 of the Evidence Act, 1872, with regard to a "contract, grant or disposition reduced to writing," in term applies, and applies alone ; "as between the parties to any such instrument, or their representatives in interest." Wherever, accordingly, evidence is tendered as to a transaction with a third party, it is not governed by the section or by the rule of evidence which it contains, and insuch a case, therefore, the ordinary rules of equity and good conscience come into play unhampered by the statutory restrictions. The principal of equity, which are universal, forbid a person to deal with property which he knows he holds on security, and not in actual ownership. In this case both the grantor and grantee in transaction by deed regarding certain land were shown by the evidence to have dealt with it with the knowledge that it belonged to a third person who was not a "party to the deeds or a representative in interest of a party" to them. It was alleged that the deeds, though in form absolute transfers of the property, were intended to be only mortgages or transfers of mortgages. *Held*, that section 92 of the Evidence Act was no bar to the admission of evidence to show what was the true nature of the transactions ; it did not prevent fraudulent dealing with a

PAGE.

Evidence, admissibility of—*concld.*

third person's property. Evidence as to that third party's rights is admissible and, if admissible, is most relevant. The series of cases cited in the judgment of which *Baksu Lakhsman* v. *Govinda Kanji*, I. L. R. 4 Bom. 594, is an example in which it has been decided that, notwithstanding the terms of section 92, evidence is admissible to show the acts and conduct of the parties to such deeds as inconsistent with the absolute transfer of the property and only consistent with the true nature of the transaction having been one of mortgage or transfer of mortgage, ceased to have any binding authority after the decision by the Board in *Balkishen Das* v. *Legge*, I. L. R. 22 All. 149 ; L. R. 27 I. A. 58, in which it was held that oral evidence was not admissible for the purpose of ascertaining the intention of parties to written documents ; and that the cases in the English Court of Chancery had no application to the law of India as laid down in the Acts of the Indian Legislature. *Achutaramaraju* v. *Subbaraju*, I. L. R. 25 Mad. 7, *Maung Bin* v. *Ma Hlaing*, 3 L. B. Rul. 100, and *Dattoo valad Totaram* v. *Ram Chandra Totaram*, I. L. R. 30 Bom. 119, referred to, as being cases in which the judgment of the Board in *Balkishen Das* v. *Legge*, I. L. R. 22 All. 149 ; L. R. 27 I. A. 58, had been rightly followed and applied. MAUNG KYIN *v.* MA SHWE LA (1917). I. L. R. 45 Calc. ... 320

Evidence, character of : *See* REVIEW ... 60

——, **Act (I of 1872), s. 3** : *See* SANCTION FOR PROSECUTION ... 585

——, **ss. 3, 74 (2)** : *See* CONTEMPT OF COURT ... 169

——, **ss. 24, 27 30** : *See* MISDIRECTION 557

——, **ss. 80, 91** : *See* DEPOSITION 823

——, **s. 91** : *See* CONTRACT FOR SALE 481

Evidence, Act (I of 1872)—*concld.* PAGE.

——**s. 92** : *See* EVIDENCE, ADMISSIBILITY OF ... 320

——, **ss. 118, 132** : *See* WITNESS 720

Examination on Commission :—*Pardanashin lady—Exemption—Code of Civil Procedure (Act V of 1908), ss. 132, 133—Costs.* Section 132 of the Code of Civil Procedure covers the case of a woman, who, although she may have abandoned the protection of the *parda*, should not be compelled to give evidence in Court, having regard to the class and community to which she belongs. SOLOMON *v.* JYOTSNA GHOSAL (1917), I. L. R. 45 Calc. 492

——: *Pardanashin lady—Practice—Right of pardanashin lady to be examined on commission—Civil Procedure Code (Act V of 1908) s. 132, cl. (1).* The petitioner a *pardanashin* lady, applied under s. 132, cl. (*1*) of the Civil Procedure Code, to be examined on commission. The opposite party objected on the ground that she had on a former occassion appeared before a Criminal Procedure Code to institute a complaint :—*Held*, that she was entitled to be examined on commission and ought not to be compelled to appear in public. *Chamatkar Mohiney Dabee* v. *Mohesh Chunder Bose*, I. L. R. 26 Calc. 651, n., *Mohesh Chunder Addy* v. *Manick Lall Addy*, I. L. R. 26 Calc. 650, followed. *In re Hurro Soondery Chowdhrain*, I. L. R. 4 Calc. 20, *In re Din Tarini Debi*, I. L. R. 15 Calc. 775, *Abhayedswari Debi* v. *Kishori Mohan Bannerjee*, I. L. R. 42 Calc. 19 ; 18 C. W. N. 1020, *Hem Coomaree Dassee* v. *Queen Empress*, I. L. R. 24 Calc. 551, *In re Faridunnissa*, I. L. R. 5 All. 92, *In re Basant Bibi*, I. L. R. 12 All. 69, discussed. BALAKESHWARI DEBI *v.* JNANANANDA BANERJEE (1917) I. L. R. 45 Calc. ... 697

Excisable Article—*Bona fide medicinal preparation containing alcohol—Unlicensed manufacture and sale of such*

PAGE.

Exciseable Article—*concld.*

—*Excise Act* (*Beng. V of 1909*), *ss.* 2 (7), (*14*), & 46 (*a*) *as amended by Beng. Act VII of 1914.* A medicinal preparation containing alcohol (ranging from 68·3 per cent. to 87 per cent. proof) is an "excisable article" within the meaning of the Bengal Excise Act (V of 1909), s. 2 (7), (*14*), as amended by Beng. Act VII of 1914. *Gonesh Chundra Sikdar* v. *Queen Empress*, I. L. R. 24 Calc. 157, *Mati Lal Chandra* v. *Emperor*, I. L. R. 39 Calc. 1053, *Satish Chandra Roy* v. *King Emperor*, 17 C. W. N. 939, declared obsolete. GANESH CHANDRA SIKDAR v. EMPEROR (1917), I. L. R. 45 Calc. 82

Excise Act (Beng. V of 1909), ss. 2 (7), 46 (*a*), as amended by Beng. Act VII of 1914 : *See* EXCISABLE ARTICLE ... 82

Exclusion : *See* HINDU LAW—INHERITANCE 17

Execution of Decree—*Mortgage bond—Money-decree—Civil Procedure Code* (*Act V of 1908*), *O. XXXIV*, *rr. 14*, *15—Declaration of lien over properties—Such properties cannot be sold in execution—Decree-holder's remedy.* Where a decree is a decree against the judgment-debtor personally with a declaration in the decree that the decree-holders are entitled to a lien over the properties—a mortgage decree having been expressly refused by the decreeing Court—the decree is merely a money-decree with a declaration of lien over the properties. Rules 14 and 15 of O. XXXIV stand in the way of properties being sold in execution of such a decree. The decree-holder's only course is to institute a suit for sale in enforcement of the mortgage. *Mungul Pershad Dichit* v. *Grija Kant Lahiri*, I. L. R. 8 Calc. 51, distinguished. GOBINDA CHANDRA PAL *v.* KAILAS CHANDRA PAL (1917), I. L. R. 45 Calc. 530

Execution of Mortgage : *See* PARDANASHIN LADY 747

Execution Proceedings : *See* JURISDICTION 926

PAGE

Executor—*Powers and duties of executor—Personal liability—Right to indemnity—Interest of minor in conflict with that of executors—Necessity of minor being represented—Insufficiently stamped hundis—Plaintiff's remedy.* Before the Hindu Wills Act (XXI of 1870), the position of an executor under the Hindu law was that of a manager. When the Hindu Wills Act incorporated section 179 of the Succession Act, the executor acquired a statutory position An executor under the statute is the legal representative of a deceased person for all purposes and all the property of the deceased person vests in him as such. He is accordingly, in many respects, in a different position from a Hindu widow succeeding to her husband's estate, a guardian of a minor, or a *shebait* of an idol. The estate of the testator is absolutely vested in the executor for the purpose of administration and he can deal with it, as he pleases, subject to his responsibility as executor for the due administration of the estate. The executor who borrows money in the course of the administration for the purposes of the estate, is personally responsible for the repayment of such debts, though he is entitled to be indemnified out of the estate for such borrowing if he shows that it was reasonably and properly made. *Labouchere* v. *Tupper*, 11 Moo. P. C. 198, *Farhall* v. *Farhall*, L. R 7 Ch. 123, *Romanath Paul* v. *Kanai Lal Dey*, 7 C. W. N. 104, *Debendra Nath Biswas* v. *Hem Chandra Roy*. I. L. R. 31 Calc 253, *Satya Prashad Pal Chowdhry* v *Matilal Pal Chowdhry*, I. L. R. 27 Calc. 683, referred to. When an executor carries on the business of his testator—whether he does so for the purpose of winding it up or of making it over as a going concern to the person or persons entitled to inherit it, there does not apprear to be any difference between his duties in so doing and his duties in dealing with any other part of the testator's estate. The responsibility rests entirely upon him subject only to

PAGE.

Executor—*concld.*

his ultimate rights to be indemnified out of the estate. Where hundis in a suit are insufficiently stamped, it is open to the plaintiff to give the go-by to the hundis, which are inadmissible in evidence, and sue for the consideration. *Golap Chand Marwaree* v. *Thakurani Mohokoom Kooaree*, I. L. R. 3 Calc. 314, *Pramatha Nath Sandal* v. *Dwarka Nath Dey*, I. L. R. 23 Calc. 851, referred to. Ordinarily the executors represent the estate but not in a case where their personal interests as executors are diametrically opposed to those of the minor. When such is the position of affairs, the minor's interests must be safeguarded and the minor properly represented at the trial. SUDHIR CHANDRA DAS v. GOBINDA CHANDRA ROY (1917) I. L. R. 45 Calc. 538

Ex parte Decree—*Collusion—Land purchased in execution—Suit for possession—Utilisation of Courts for creation of fictitious titles, whether permissible—Benamidar's right to sue.* Where A sued his widowed sister B collusively for money alleged to have been advanced to her husband, and obtained an *ex parte* decree, and in execution thereof purchased B's property also collusively at a sale held by the Court, and thereafter instituted a suit for recovery of possession on establishment of title: *Held*, that Courts of Justice should not be permitted to be utilised for the purpose of creating fictitious titles, which must inevitably tend to weaken the sanctity which justly attaches to judicial transactions. It was open to a party to impeach the reality of a transaction between two private individuals and equally open to him to impeach the reality of a judicial proceeding. *Held*, also, that in suits for land an action could not be maintained by a *benamidar*. *Bandon* v. *Becher*, 3 Cl. & F. 479, *Atrabannessa Bibi* v. *Satatullah Mia*, 22 C. L. J. 259, followed. *Rambehari Sarkar* v. *Surendra Nath*

PAGE.

Ex parte Decree—*concld.*

Ghose, 19 C. L. J. 34, *Hari Gobind Adhikari Akhoy* v. *Kumar Mozumdar*, I. L. R. 16 Calc. 364, *Mohendra Nath Mookerjee* v. *Kali Prosad Johuri*, I. L. R. 30 Calc. 265, referred to. *Ram Bhurosee Singh* v. *Bisseser Narain Mahata*, 18 W. R 454. dissented from. SURENDRA NATH GHOSE v. KALI GOPAL MOZUMDAR (1917) I. L. R. 45 Calc. 920

Fair Comment: *See* CONTEMPT OF COURT 169

Family Custon: *See* CUSTOM ...450, 833

Fictitious Titl: *See* EX PARTE DECREE ... 920

Fixtures: *See* ADMINISTRATION ... 653

Foreign-Court Decisions: *See* MAHOMEDAN LAW—MARRIAGE 878

Forfeiture of Adoptoin: *See* BURMESE BUDDHIST LAW 1

Form of Warrant: *See* SEARCH WARRANT 905

Formalities: *See* DEPOSITION ... 823

Fraudulent Representation: *See* RES JUDICATA 442

Gains by Skill: *See* HINDU LAW—JOINT FAMILY 666

——**In Business**: *See* HINDU LAW—JOINT FAMILY 666

——**of Science or Learning**: *See* HINDU LAW—JOINT FAMILY 666

Gift: *See* HINDU LAW—JOINT FAMILY 732

——**validity of**: *See* OCCUPANCY HOLDING 434

Grant: *See* CUSTOM 833

Guardian: *See* HINDU LAW—REVERSIONER 590

Guardianship: *See* MAHOMEDAN LAW—MARRIAGE 878

High Court, jurisdiction of: *See* MUNICIPAL ELECTION 950

Hindu Law—Inheritance—*Exclusion from Inheritance—Mittakshara Law—Blindness, not a disqualification unless congenital.* The appellant, as his only child and heir, sued for the property of her father, a Hindu who had become blind in the early years of his life, and remained so until his death, and had taken his separate share of the family property.

PAGE.

Hindu Law—Inheritance—*concld.*

under a decree made on a compromise of a suit for partition brought against him by his younger brother, they having lived together as members of a joint family governed by the law of the Mitakshara. The defence by his brother, against whom the suit was brought, was that there had been no partition and that on his brother's death he became entitled to the whole family property by survivorship. He contended that his brother's blindness was congenital which excluded him from inheritance; but that even assuming he was not born blind but became so after birth he was, according to the Mitakshara law of the Benares school excluded from participation of a share, inasmuch as the blindness occurred before the alleged partition. *Held*, that blindness to cause exclusion from inheritance must be congenital. Mere loss of sight which has supervened after birth is not a ground for disqualification. Incurable blindness, if not congenital, is not such an affliction as under the Hindu Law excludes a person from inheriting. Sarvadhicari's Hindu Law of Inheritance, page 956, refered to. *Mohesh Chunder Roy* v. *Chunder Mohan Roy*, 14 B. L. R. 273; 23 Suth. W. R. 78, and *Murarji Gokuldas* v. *Parvatibai* I. L. R. Bom. 177, approved and followed. GUNJERWAR KUNWAR *v.* DURGA PRASHAD SINGH (1917) I. L. R. 45 Calc. 17

——— **Joint Family**—*Mitakshara Law—Gains obtained in business by member who had received an ordinary education at expense of the joint family—Gains of science or learning—Gains obtained by skill, mental ability and individual effort.*—There is no authority in the Mitakshara for the contention that the gains made personally, and without the aid of the joint funds, by a member of a joint family who received an ordinary education suitable to his position as a member of the family to

PAGE.

Hindu Law—Joint family—*contd.*

which he belonged, should in law be regarded as partible, and not as his self acquired property. The author of the Mitakshara must have been writing of education—"learning"—such as he knew it to be; and when he laid down that the gains obtained by one of the members of a joint family from an education received at the family expense should be partible, he could not have intended that such gains should include gains which were the result, not of the education received at the expense of the joint family but of the peculiar skill, mental abilities and individual effort, in applying and improving such education, exercised by the member who had been so educated. The question of whether a member of a joint family carried on his business personally for his own personal benefit, without detriment to the joint family funds, or carried on such business as a member of the joint family, for the benefit of the joint family, is a question of fact to be determined on the evidence. METHARAM RAMRAKHIOMAL *v.* REWACHAND RAMRAKHIOMAL (1917), I. L. R. 45 Calc. 666

———*Joint family—Mitakshara law—Managing member, blending accounts of self-acquired property and joinl property—Mutuul exchanges on "deorh" partition of joint property for self-acquired property—Deeds of gift of joint ancestral property set aside.* Three brothers were members of a Mitakshara joint family, *D* being the managing member and guardian of *K* who was a minor. The family property consisted partly of joint property, and partly of property which came to them from the estate of a deceased brother. Only one account book was kept for the joint shares of the latter property, and that system of book-keeping which began in October 1878, was continued till February, 1880, when *K* came of age. No separate book was thereafter kept

PAGE.

Hindu Law—Joint Family—*concld.*

by or for *D* in respect of the property which had come to them from their brother's estate ; but there was one account for all *D's* receipts from all sources whether it was income from the joint family property, or from that which had been acquired from the brother's estate, or any other sort of revenue, and similarly for all his expenditure of whatsoever kind. Further, on " a deorh " partition, that is, an actual partition of the several properties constituting their estates, mutual exchanges were made whereby *D* gave up his share in some ancestral family property for the share of *K* in the property acquired from the brother's estate. In a suit by *D's* son and grandsons (the appellants) after the death of *D* to set aside deeds of gift made by *D* in favour of the respondents, on the ground that they had been made out of the joint ancestral property, and were therefore invalid :—*Held*, (reversing the decision of the High Court), that the property coming from the brother's estate to the members of the family as collateral heirs was self-acquired property ; that by blending that property with the joint property in the accounts, and by the mutual exchanges made on the partition, *D* had thrown it into the common stock, and thereby converted it into ancestral family estate. All the properties purporting to be conveyed to the respondents by the deeds of gift were joint family properties over which *D* had no power of disposition. and the appellants were entitled to recover them. *Suraj Narain* v. *Ratan Lal*, I. L. R. 40 All. 159 ; L. R. 44 I. A, 201, followed. RADHAKANT LAL *v.* NAZMA BEGUM (1917), I. L. R. 45 Calc. 732

——— **Reversioner**—*Rights of reversioner—Suit to recover property of grandfather alienated during infancy of next reversioner to agnates of deceased—Compromise by female owner and her husband—Award in terms of compromise—Award made decree of Court under Act VIII of 1859, s. 327—Limitation Act 1877, Sch. II, Arts. 95, 141—Guardian of minor.* A Hindu reversioner has no right or interest *in præsenti* in the property which the female owner holds for her life Until it vests in him on her death, should he survive her, he has nothing to assign, or to relinquish, or even to transmit to his heirs. His right becomes concrete only on her demise ; until then it is a mere "*spes successionis.*" His guardian, if he happens to be a minor, cannot bargain with it on his behalf, or bind him by any contractual engagement in respect thereto. On the death without issue of a Hindu governed by the Mitakshara law, and admittedly separated from his agnatic relations (respondents) leaving a widow, a daughter *K*, and his daughter's son, a minor (appellant). the widow though opposed by the agnates obtained possession of her husband's property for her life estate. On her death in 1864, a dispute arose with the agnates as to *K's* right to suceeed, in which her husband *R* took part as representing *K*, though there was nothing show that he had any authority to to act as her agent The matter was referred to arbitration, but before the arbitrators had taken any action a compromise was come to in which *R* purported to act for *K* and her infant son, the effect of which was to completely extinguish the reversionary interest of the appellant in his grandfather's estate. The arbitrators made an award in accordance with the terms of the compromise. It was not shown that the proceedings before the arbitrators ever came to the knowledge of *K*, but it appeared that she did not acquiesce in the award and the agnates had to apply to have it made a decree of Court under section 327 of Act VIII of 1859, the then Code of Civil Procedure ; and notwithstanding

PAGE.

Hindu Law—Reversioners—*contd.*

K's continued opposition such a decree was made and enforced, and the respondents were put into possession of the properties in 1865. *K* died in 1905, and in 1908 the appellant brought a suit to set aside the arbitration proceedings together with the compromise and award as being fraudulent and taken and entered into without knowledge or authority of *K*, and for a declaration that he was not bound by them. *Held* (reversing the decision of the High Court), that until *K's* death the appellant had no right or interest in the properties which could be the subject of bargain : *R's* action in referring to arbitration any matter connected with the appellant's reversionary right was, therefore, null and void. The award was based on the compromise, and even if the appellant had had an existing right *R* would have had no power to enter into an arrangement which extinguished his interest practically without consideration. The compromise too was not for the benefit of the minor. The decree enforcing the award was based on the finding that *K* had, by her husband *R*, acquiesced in the reference to arbitration, and that she had consented to the compromise, and was therefore bound by the award : the order of the District Judge which was affirmed by the High Court affected *K's* interest and hers only. The minor was not a party to the appeal to the High Court, and the Civil Courts did not in any way purport to deal with or adjudicate upon his reversionary right. The proceedings, therefore, culminating in the decree by which the appellant was sought to be bound, were entirely devoid of the conditions on which alone a reversioner can be shut out from the assertion of his right which comes to him altogether independently of the female owner. *Katama Natchiar* v. *Rajah of Shivagunga*, 9 Moo. I. A. 539, distinguished. AMRIT NARAYAN SINGH

PAGE.

Hindu Law—Reversioners—*concld.*

v. GAYA SINGH (1917), I. L. R. 45 Calc. 590

House and Town Planning Act, 1909 (9 Edw, VII c. 44), s. 58 (3) : *See* RECOUPMENT 343

Hundis, insufficiently stamped : *See* EXECUTOR 538

Identity : *See* PARTIES 159

Illegal Cess—*Abwab—Suit for arrears of rent—Consideration for grant of patni—Stipulation in kabuliat to pay sum as mamuli for the idol Isswar Thakur—Recovery of Rents Act (Ben. X of 1859), s. 10—Regulation VIII of 1793, ss. 52, 54—Regulation V of 1812 s. 3.* In a suit to recover Rs. 3,330-4 as arrears of *patni* rent, the defendants pleaded that Rs. 15 had been claimed in excess and that this sum was in the nature of an *abwab* and not recoverable. The *kabuliat* on which this suit was based provided that an annual rent of Rs. 3,315-4 should be paid by 12 monthly instalments. In a subsequent clause it stipulated that in the month of *Bhadra* every year a further sum of Rs. 15 should be paid as *mamuli* for the *Isswar Thakur* at the lessor's house and then went on to state that if the lessee failed to pay the said sum of Rs. 15 amicably, the lessor should deduct the same from the money remitted by the lessee as rent, or sue for the amount along with or separately from the arrears of rent, and the lessee would not take objections thereto :—*Held*, that the sum of Rs. 15 was not intended by the parties to be part of the consideration for the use and occupation of the land or as part of the rent. It did not form part of the rent, nor was it treated as part of the rent and was not recoverable. *Held*, also, that s. 3 of Regulation V of 1812 referred only to the amount which was by the contract fixed as the rent payable to the landlord. *Per* SANDERSON C. J. The rule which has been followed in this Court is, that each case must depend upon the proper construction

PAGE.

Illegal Cess—*concld.*

of the contract before the Court and, if upon a fair interpretation of the contract it can be seen that a particular sum is specified in the contract, or agreed to be paid as the lawful consideration for the use and occupation of the land, *i e.*, if it is really part of the rent, although not described as such, the landlord can recover it. *Per* CHATTERJEA J. It is only the rent, and not any other sum though not indefinite, and though agreed upon to be paid in the written engagement, which can be recovered. In determining whether an item does or does not form part of the rent, the fact that it has been stipulated to be paid separately from the rent, and also the fact that it is not included in the instalments of rent, have an important bearing on the question. *Upendra Lal Gupta* v. *Meheraj Bibi*, 21 C. W. N. 108, explained. BIJOY SINGHA DUDHURIA KRISHNA *v.* BIHARI BISWAS (1917) I. L. R. 45 Calc. 259

Immoveables, English mortgage of : *See* ADMINISTRATION 653

Impossibility of Performance : *See* SALE OF GOODS 28

Incumbrance : *See* LANDLORD AND TENANT 755

Indemnity, right to : *See* EXECUTOR ... 538

Inheritance : *See* CUSTOM 450

Inundated Lands : *See* CUSTOM ... 475

Judges, prosecution by : *See* CONTEMPT OF COURT 169

Judgment : *See* MISJOINDER ... 111

Judicial Discretion : *See* COMMISSION AGENCY 138

Jurisdiction : *See* APPEAL 816

Jurisdiction : *See* ATTACHMENT BEFORE JUDGMENT 779

Jurisdiction : *See* COMPANY ... 486

———— : *See* CONTEMPT OF COURT ... 169

———— : *See* COURT-FEE ... 634

———— : *See* DIVORCE ... 525

———— : *See* PARTITION ... 873

PAGE.

Jurisdiction—*concld.*

Jurisdiction : *See* RENT 768

———— *See* SANCTION FOR PROSECUTION 336

Jurisdiction—*Execution proceedings—Suits above Rs. 5,000—Appeal from order in execution proceedings—Civil Courts Act (XII of 1887), s. 21, sub-s. (1)—Civil Procedure Code (Act V of 1908), ss. 99,100, 108.* Where, in execution proceedings in a mortgage suit the value of which exceeded Rs. 5,000, an order was made by the Court of first instance which on appeal was modified by the District Judge : *Held*, that the order of the District Judge was made without jurisdiction and was contrary to law. In such a suit, an appeal against an order made in a proceeding arising out of the decree lay to the High Court and not to the Court of the District Judge under the provisions of s. 2, sub-s (*1*) of the Bengal Civil Courts Act, 1887. *Held*, also, that as the order was passed on appeal by the District Judge, a second appeal lay to the High Court under s. 100 of the Civil Procedure Code 1908. *Ranjit Misser* v. *Ramudar Singh*, 16 C. L. J. 77, referred to. BANDIRAM MOOKERJEE *v.* PURNA CHANDRA ROY (1917) I. L. R. 45 Calc. 926

Jurisdiction of Magistrate : *See* BROTHEL 301

Kabuliat : *See* ILLEGAL CESS ... 259

Kittima Adoption : *See* BURMESE BUDDIST LAW 1

Lakheraj Lands—*Presumption arising from possession—Omission of entry in Pargana register, Kanungo register, General and Mauzawar register, Thakbust map, evidentiary value of—Bengal Tenancy Act (VIII of 1885), ss. 103B, 106—Regulation XIX of 1793, ss. 22 to 25.* A purchased a putni taluk in 1899, and the Record of Rights was finally published in 1909, containing an entry to the effect that no rent was actually paid but that the occupant B was not entitled to hold without payment of

PAGE.

Lakheraj Lands—*concld.*

rent. B instituted a suit under s. 106 of the Bengal Tenancy Act, for a declaration that the lands were his rent-free *brahmottar*, and that the entries, in so far as they stated that the lands were liable to be assessed to rent, were incorrect, and claimed continued possession without payment of rent or revenue since the date of the grant of the lands to his predecessors A relied upon the omission of any entries as to the lands being *lakheraj* in the Pargana, Kanungo, General and Mauzawar registers and Thakbust maps and proceedings :—*Held*, also, that the proved possession free from payment of rent was sufficient to rebut the presumption that the lands were liable to be assessed to rent. *Held*, further, that the omission from the Pargana, Kanungo, General and Mauzawar registers, and Thakbust maps and statements, of any indication that the lands were *lakheraj*, was of no evidentiary value. *Held*, therefore, in the absence of proof of payment of rent at any time, that the lands were *lakheraj* and no part of the *mal* assets of zemindari or putni. BIPRADAS PAL CHOWDHURY *v.* MANORAMA DEBI (1917), I. L. R. 45 Calc. 574

Land Acquisition Act (I of 1894), ss. 6, 9, 23 (1) (4), 24 (6), 48 : *See* RECOUPMENT 343

Landlord, interest of : *See* SALE ... 294

Landlord and Tenant—*Adverse possession—Title—Under-tenant—Purchase of tenancy by auction-purchaser—Incumbrance—Notice of annulment proceedings—Bengal Tenancy Act (VIII of 1885), ss. 161, 167.* When a person has, by adverse possession against a sub-tenant, acquired a statutory title to a portion of the lands comprised in the sub-tenancy, he has an interest in the sub-tenancy, so that when on a sale of the superior tenancy for arrears of rent, the purchaser seeks to annul

PAGE.

Landlord and Tenant—*concld.*

the sub-tenancy as an "incumbrance" such person stands in the position of an "incumbrancer," and is entitled to notice under section 167 of the Bengal Tenancy Act. BHUSHAN CHANDRA GHOSH *v.* SRIKANTA BANERJEE (1916), I. L. R. 45 Calc. 755

———*Presumption of permanency of rent—Bengal Tenancy Act (VIII of 1885) as amended by Bengal Acts of 1898 and I of 1903, ss. 31A, 50(2), 113 and 115—Effect of ss. 31 and 113 of the Bengal Tenancy Act—Prevailing rate—Ground for enhancement of rent.* Where a Record of Rights has been finally published, in view of s. 115 of the Bengal Tenancy Act, the presumption under s. 50 (2) of the Act does not arise where the tenants have been recorded as occupancy raiyats and not raiyats holding at fixed rents. *Radha Kishore Manikya* v. *Umed Ali*, 12 C. W. N. 904, not followed. *Pirthichand Lall Chowdhry* v. *Basarat Ali*. I. L. R. 37 Calc 30 ; 13 C. W. N. 1149, relied upon. By enacting s. 31 of the Bengal Tenancy Act the Legislature never intended to alter the pre-existing law in districts to which that section has no application. Where each tenant holds at a different rate there is no prevailing rate. Even on the ground of prevailing rate, there can be no enhancement of rent for 15 years, under s. 113 of the Bengal Tenancy Act, where rent has been settled under Chapter X of the Act HARIHAR PERSAD BAJPAI *v.* AJUB MISIR (1913), I. L. R. 45 Calc. ... 930

Lands Clauses Consolidation Act (8 & 9 Vict. c. 18), ss. 63, 68 : *See* RECOUPMENT 343

Lease—*Darpatni, conditions in Bengal Tenancy Act (VIII of 1885), ss. 159 cl. (b), 179—Transfer of Property Act (IV of 1882), s. 10—Receiver—Appointment of Receiver in administration suit—Civil Procedure Code (Act XIV of 1882), ss.*

PAGE.

Lease—*concld.*

503, 505. A, a *patnidar*, created a *darpatni*, in 1886 in favour of B, which contained the following terms : "like yours If we shall have full rights to grant leases or make settlements of land in the mofussil ; but if these *darpatni* mahals be sold at auction for arrears of malikana (rent) due to you, then all agreements entered into by us shall be extinct (stand annulled)." The common manager of B's estate granted to the defendants a permanent under-tenure in 1901. B having defaulted to pay rent to A, the latter in execution of a decree for arrears of rent purchased B's interest on the 21st September 1904 ; the sale was confirmed in due course on the 20th March 1905. The Receiver of the estate of A, appointed by a decree in an administration suit, without permission from the District Judge, granted a *darpatni* to the plaintiff in 1906 : *Held*, that A and B were competent to enter into a contract of permanent tenancy subject to the restriction actually imposed which was one of the incidents of the under-tenure and ran with the land so as to be operative not only between the grantors and grantees but also their representatives in interest and the holders of derivative titles from them. *Held*, also, that the condition in the lease not being an absolute restraint on alienation and being for the benefit of the lessor, neither the provisions of s. 159 of the Bengal Tenancy Act nor s. 10 of the Transfer of Property Act had any application. *Held*, further, that the Receiver not being appointed under s. 503 of the Civil Procedure Code of 1882, but by a decree in an administration suit the provision of s. 505 requiring permission of the District Judge did not apply, and the *darpatni* granted by such Receiver was valid and unassailable. MADHU UDAN MAHTON *v.* MIDNAPORE ZEMINDARI CO. (1917), I. L. R. 45 Calc. 940

PAGE.

Lease, construction of—*Mokarari Lease —Grant of Land "mai hak hakuk" (with all rights)—Mineral and other sub-soil rights—Rights not expressly included in terms of lease. Held* (reversing the decision of the High Court), that the expression "*mai hak hakuk*" ("with all rights") in a mokarari lease of land did not add to the true scope of the grant nor cause mineral rights to be included within it. The essential characteristic of a lease is that the subject of it is one which is occupied and enjoyed, and the corpus of which does not in the nature of things and by reason of the user, disappear. Unless there be by the terms of the lease an express, or plainly implied, grant of mineral rights they remain reserved to the zamindar, there being no evidence of his having parted with them. *Hari Narayan Singh Deo* v. *Sriram Chakravarti*, I. L. R. 37 Calc. 723 ; L. R. 37 I. A. 136, *Durga Prasad Singh* v. *Braja Nath Bose*, I. L. R. 39 Calc. 696 ; L. R. 39 I. A. 133. and *Shashi Bhusan Misra* v. *Jyoti Prashad Singh Deo*, I. L. R. 44 Calc. 585 ; L. R. 44 I. A 46, followed. *Megh Lal Pandey* v. *Rajkumar Thakur*, I. L. R. 34 Calc. 358, overruled. By the terms of the lease, trees on the land were expressly transferred to the grantee ; but mineral rights were not so included in its terms ; and the presumption was therefore, that the zamindar had not intended to transfer them, and they did not pass under the lease. RAJ KUMAR THAKUR GIRIDHARI SINGH *v.* MEGH LAL PANDEY (1917), I. L. R. 45 Calc. ... 87

Lease, determination of : *See* EJECTMENT 469

——, forfeiture of : *See* EJECTMENT ... 469

Legality : *See* SEARCH WARRANT ... 905

Letters of Administration, application for : *See* PARTIES 860

Letters Patent, 1865, cl. 15 : *See* APPEAL 502 ; 816

——————— : *See* MISJOINDER 111

PAGE.

Lien, declaration of: *See* EXECUTION OF DECREE 530

Limitation: *See* SUIT 934

Limitation—*Attachment in execution—Claim proceeding—Claim rejected for default and without investigation—Subsequent title suit—Limitation Act (IX of 1908), Sch. I, Art. 11—Civil Procedure Code (Act V of 1908) O. XXI, rr. 58 and 63.* Where a claim is preferred under O. XXI, r. 58 of the Civil Procedure Code and an order is passed either allowing or rejecting, the party against whom the order is made may, irrespective of whether any investigation took place or not, bring a suit in the language of O. XXI, r. 63 "to establish the right which he claims to the property in dispute" or in the language of Art. 11 of Sch. I of the Limitation Act, 1908, "to establish the right which he claims to the property comprised in the order," and the suit must be brought within the year allowed by Art. 11. *Sardhari Lal* v. *Ambika Pershad*, I. L. R. 15 Calc. 521; L. R. 15 I. A. 123, *Jugal Kishore Marwari* v. *Ambika Debi*, 16 C. W. N. 882, and *Umacharan Chatterjee* v. *Heron Moyee Debi*, 18 C. W. N. 770, referred to. *Narasimha Chetti* v. *Vijiapala Nainar*, 27 Ind. Cas. 944, and *Ponnusami Pillai* v. *Samu Ammal*, 31 Mad. L. J. 247, approved. NAGENDRA LAL CHOWDHURY *v.* FANI BHUSAN DAS (1918) I. L. R. 45 Calc. 784

——*Bengal Tenancy Act (VIII of 1885), ss 104H, 111A—Scope of s. 104H—Limitation governing suits under s. 104H—Reliefs outside s. 104H but within proviso to s. 111A.* Section 104H of the Bengal Tenancy Act only refers to suits by a person aggrieved by an entry of rent settled in a Settlement Rent Roll prepared under ss. 104F to 104H or by an omission to settle such a rent and suits, falling under that section, are governed by the special limitation provided in that section. Where reliefs claimed are outside the scope

PAGE.

Limitation—*contd.*

of s. 104H and fall within the provision to s. 111A, the limitation applicable is that provided by Art. 120 of the second schedule to the Limitation Act. *Promoda Nath Roy* v. *Asiruddin Mandal*, 15 C. W. N. 896, followed. RAJANI KANTA MOOKERJEE *v.* SECRETARY OF STATE FOR INDIA (1917) I. L. R. 45 Calc. ... 645

——*Execution of money-decree—Part payment—Uncertified payment or adjustment—Civil Procedure Code (Act V of 1908), O. XXI, r. 2, sub-r. (3). Limitaton Act (IX of 1908), s. 21. Sch. I, Art. 182.* Where a decree for money was made on the 24th November 1909 and an application for execution of the same was presented on the 7th June 1916 and where two payments were alleged to have been made in 1912 and 1913, respectively, neither of which was certified to the Court: *Held*, that the application was *prima facie* barred by limitation under Art. 182 of the Limitation Act. *Held*, also, that an uncertified payment or adjustment could not operate to prolong the period of limitation for an application for the execution of a decree under the Limitation Act. *Held*, further, that under the Hindu Law, in the absence of the father, the mother was entitled to be the guardian of her infant sons in preference to their brother and was the "lawful guardian" under s. 21 of the Limitation Act. *Jogendra Nath Sarkar* v. *Provath Nath Chatterjee*, 19 C. L. J. 126, *Kutubullah Sarkar* v. *Durga Charan Rudra*, 13 I. C. 424, *Bhajan Lal* v. *Cheda Lal*, 12 All. L. J. 825, and *Mahtaboo* v. *Gunesh Lal*, (1854) (Beng.) S. D. A. 329, followed BIRESWAR MUKERJEE *v.* AMBICA CHARAN BHATTACHARJEA (1917) I. L. R. 45 Calc. ... 630

——*Limitation (Act IX of 1908) ss. 5, 14—General rule for exercise of judicial discretion to admit an appeal which would otherwise be time-barred —"Sufficient cause"—Reasonable*

PAGE.

Limitation—*contd.*

diligence in prosecution of appeal—Deduction of time in prosecuting with due diligence an application for review of judgment—Order for abatement of suit—Civil Procedure Code, 1882, ss. 366, 368, 371—Revision allowed under s. 371—Order of abatement made ex parte Judge refusing to follow general rule laid down by Full Bench case—Appellate Court, can remit case or exercise discretion itself. For the exercise of the judicial discretion allowed by section 5 of the Limitation Act, 1908 to admit, for "sufficient cause," an appeal which would be otherwise barred as being out of time, the case of *Karm Bakhsh* v. *Daulat Ram*, (1888) P. R. No. 183, lays down a general rule that the true guide is whether the appellant has acted with reasonable diligence in the prosecution of his appeal; and he ought to be deemed to have so acted where, after deducting the time spent in prosecuting with due diligence a proper application for review of judgment, the period between the date of the decree appealed from and the date of presenting the appeal does not exceed the period prescribed for preferring an appeal. *In re Brojendra Coomar Roy*, B. L. R. Sup. Vol. 728; 7 Suth. W. R. 529, in which *Nobbo Kishen Singh* v. *Kaminee Dassee*, B. L. R. Sup. Vol. 349; 2 Suth. W. R. Mis. 85, was followed, referred to. This general rule, or one practically similar, has been adhered to by all the High Courts in India; and the Judicial Committee will not interfere with such a rule of procedure so laid down. Where a Judge purporting to exercise such discretion does so under the view that there is no general rule, when in fact there is one which he ought to follow as being binding on him, he misdirects himself as to the law to be applied to the case; he cannot exercise a judicial discretion, and an Appellate

PAGE.

Limitation—*concld.*

Court should either remit the case or exercise the direction itself. The remedy by revision given to the representatives of a plaintiff by section 371 of the Civil Procedure Code, 1882, when an order for abatement of a suit has been made, is applicable whether the order has been made under section 366 on the death of a plaintiff, or under section 368, on the death of a defendant; the words of section 371 being "where a suit abates under this chapter" which includes both sections 366 and 368. An order abating a suit should not be made *ex parte*. The opposite party should be given opportunity of appearing before any order for abatement is made. The introduction of a plaintiff or a defendant for one stage of a suit is an introduction for all stages, even if it be made on an appeal from a mere interlocutory order. BRIJ INDAR SINGH *v.* KANSHI RAM, (1917) I. L. R. 45 Calc. ... 94

Limitation Act, 1877, Sch. II, Arts. 95, 141: *See* HINDU LAW—REVERSIONER 590

Limitation Act (IX of 1908) ss. 5, 14: *See* LIMITATION 94

——————————**s. 21, Sch. I, Art. 182:** *See* LIMITATION ... 630

——————————**ss. 29, 15, (2):** *See* SUIT 934

——————————**Sch, I, Art. 11:** *See* LIMITATION 784

List of Members: *See* COMPANY ... 490

Magistrate, duty of: *See* COMPROMISE ... 814

Mahomedan Law: *See* CUSTOM ... 450

Mahomedan Law,—Marriage, *validity of—Guardianship of minor—Power of mother as de facto guardian to alienate her minor children's interests in immoveable property so as to bind the infants—Absence of entries in account books as evidence against validity of marriage where regular payments to other wives are shown by other entries—Production at first hearing of suit of documentary evidence*

PAGE.

Mohamedan Law—Marriage—*contd.*

relied on by parties—Civil Procedure Code, 1908, O. XIII, r. 1—Practice of Indian Courts in citing decisions of Foreign Courts. A wealthy Mahomedan died leaving widows, two admittedly his lawful wives and children by each of them, and a third one Z who claimed to be his married wife, but the validity of whose marriage was disputed. She had two minor children, and by a deed of 10th June 1906, without having been legally appointed their guardian, she purported to transfer the shares of both herself and her childern in the property of the deceased to the plaintiff who sued for a declaration of the title and status of their vendor, and for a decree for possession of the shares covered by the deed of sale. As to the validity of the marriage of Z, entries in the books of account of the deceased tendered in evidence by the contesting defendants (the sharers other than Z and her children) showed regular payments to the admittedly lawful wives, but the books contained no entries of payments to Z. They were not admitted in evidence by the lower Courts. *Held* by the Judicial Committee (who held the books of account admissible), that there was clear evidence of a reliable character regarding the acknowledgment by the deceased of the childern of Z as his legitimate issue, which gave rise to a legal presumption of her marriage; and that such presumption was not displaced by the mere inferences, the contesting defendants sought to draw from the absence of entries in her favour in the account books. The marriage was, therefore, valid under the decision in *Mahatala Bibee* v. *Haleemoozaman*, 10 C. L. R. 293, and Z and her children were entitled to their shares in the inheritance. *Held*, also, that Z had no power to deal with the minors' shares as she had done, and that only her own shares passed under the deed of sale.

PAGE.

Mohamedan Law—Marriage—*contd.*

By Mahomedan Law the mother is entitled only to the custody of the person of her minor child up to a certain age according to the sex of the child. But she is not the natural guardian; the father alone or, if he be dead, his executor (under the Sunni law) is the legal guardian. *Mata Din* v. *Ahmed Ali*, I. L. R. 34 All. 213: L. R. 39 I. A. 49, referred to and discussed. On a review of the provisions and principles of the Mahomedan Law on the question of how far, and under what circumstances, a mother's dealings with the property of her minor child are binding on the infant:—*Held*, that one who has charge of the person or property of a minor without being his legal guardian, and who may therefore be conveniently called a "*de facto* guardian," has no power to convey to another any right or interest in immovable property which the transferee can enforce against the infant: nor can such transferee, if let into possession of the property under such unauthorised transfer, resist an action in ejectment on behalf of the infant as a trespasser. It follows that being himself without title he cannot seek to recover property in the possession of another equally without title. *Ayderman Kutti* v. *Syed Ali*, I. L. R. 37 Mad. 514, referred to and commented on. Order XIII, rule 1 of the Civil Procedure Code, 1908, requires the parties or their pleaders to produce at the first hearing of the suit all the documentary evidence of every description in their possession or power "on which they intend to rely." But it does not exclude the discretion of the Court to receive any such documentary evidence at any subsequent stage. Their Lordships of the Judicial Committee deprecated the practice in some of the Indian Courts of referring largely to decisions of Foreign Courts, to which Indian practitioners could not be expected

PAGE.

Mohamedan Law—Marriage—*concld.*

to have access, which were often based on consideration and conditions totally differing from those applicable to or prevailing in India, and are only likely to confuse the administration of justice. IMAMBANDI *v.* MUTSADDI (1918) I. L. R. 45 Calc. 878

Manager and Director of Newspaper Company, liability of: *See* CONTEMPT OF COURT 169

Managing Member: *See* HINDU LAW—JOINT FAMILY 732

Marriage, validity of: *See* MAHOMEDAN LAW—MARRIAGE 878

Married Women: *See* ABDUCTION ... 641

Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 28: *See* DIVORCE 525

Medicinal Preparation: *See* EXCISABLE ARTICLE 82

Mineral Rights: *See* LEASE, CONSTRUCTION OF 87

Minor, interest of: *See* EXECUTOR ... 538

Minority:—*See* TITLE, PROOF OF ... 909

Misdirection—*Confession—Instructions to Jury to consider non-confessional statements against co-accused—Direction to consider question of admissibility of confessions—Duties of Judge and Jury as to mode of dealing with confessions—Use in the charge to the Jury of expressions assuming guilt of the accused, and of slang terms—Discovery—Admissibility of part of information leading to discovery—Verification of confessions—Oral evidence of unrecorded confessions made in verification proceedings—Misdirection in placing before Jury information not leading to discovery and such unrecorded confessions—Criminal Procedure Code (Act V of 1898), ss. 164, 298—Evidence Act (I of 1872), ss. 24, 27, 30.* It is a misdirection, which must have misled the Jury, to instruct them to take into consideration statements not amounting to confessions by an accused as against the co-accused.

PAGE.

Misdirection—*contd.*

It is a misdirection to put to the Jury and to leave it to them to determine whether a confession to a Magistrate, and how much of a confession to the police, are admissible. It is the duty of the Judge to determine the question of the admissibility of evidence, in accordance with the law on the subject, and of the Jury to estimate the value of such evidence after its admission by the Judge. The Judge should avoid the use, in the charge to the Jury, of interrogative expressions assuming the guilt of the accused, such as "*Is not this*," or "*Does not that*," and of slang and colloquial phrases. Section 27 of the Evidence Act qualifies not only sections 25 and 26 but also section 24. *Queen Empress* v. *Babu Lal*, I. L. R. 6 All. 509, approved. Though the accused has himself produced the stolen articles, so much of his anterior statements as led to the discovery are admissible under s. 27 of the Evidence Act, but not statements contemporaneous with the act of production, such as "*I got these ornaments as my share in the dacoity.*" *Queen Empress* v. *Nana*, I. L. R. 14 Bom. 260, and *Legal Remembrancer* v. *Chema Nashya*, I. L. R. 25 Calc. 413, referred to. Section 27 does not render admissible the whole history of the investigation, or an account of the various steps by which the police obtained and worked up clues and finally succeeded in arresting the accused. Under the section the whole of the statement of an accused is not admissible but only so much as led directly to the discovery or related directly to the fact discovered. *Per* SHAMSUL HUDA J. If a single statement contains more information than is contemplated by s. 27, the whole statement is not admissible but only the particular information which led to the discovery. Where an accused states to the police that he killed A with a knife and concealed the corpse at a particular place, the only part of the information admissible under the

PAGE.

Misdirection—*concld.*
section is that relating to the concealment and not the murder. *Queen-Empress* v. *Babu Lal*, I. L. R. 6 All. 509, followed. *Per* TEUNON J. Verification proceedings are not wholly illegal, and may be useful in testing the truth of the confession. *e.g.*, as to the accused's knowledge of the localities he has mentioned, or as furnishing clues to a further inquiry. *Per* SHAMSUL HUDA, J. Verifications in the company of the accused lead to very great abuses and should be avoided, though a verification independently of, and unaided by, the accused, is unobjectionable. *Held per* CURIAM. In connection with such proceedings, the Courts must ensure against the reception of evidence not strictly admissible. Statements to the verifying Magistrate, when not recorded in the manner provided by s. 164 of the Criminal Procedure Code, are inadmissible and cannot be proved orally by such Magistrate. *Emperor* v. *Radhe Halwai*, 7 C. W. N. 220, *King-Emperor* v. *Rajani Kanto Koer*, 8 C. W. N. 22 *Queen-Empress* v. *Bhairab Chunder Chukerbutty*, 2C. W. N. 702, and *Queen-Empress* v. *Viran*, I. L. R. 9 Mad. 224, followed. *Per* SHAMSUL HUDA J. Even if the statements are recorded after the verification is completed, it would be difficult to hold that they were voluntary. AMIRUDDIN AHMED *v.* EMPEROR (1917), I. L. R. 45 Calc. ... 557

Misjoinder—*Parties—Appeal—Causes of action—Practice—Judgment—Civil Procedure Code (Act V of 1908), O. I., rr. 1 and 3; O II, r. 3—Letters Patent, 1865, cl. 15.* An appeal lies, under the Letters Patent, from an order of the High Court on its Original Side, refusing to allow plaintiff to proceed in one suit against several defendants on the ground of misjoinder and giving him time to elect how he would proceed with his suit and which of the defendants he would retain on the record. O. I, r. 1, and O. I, r. 3 of the Civil

PAGE.

Misjoinder—*concld.*
Procedure Code apply to questions of joinder of parties as also of causes of action. *Umabai* v. *Bhau Balwant*, I. L. R. 34 Bom. 358, and *Jankibai* v. *Shinivas Ganesh*, I. L. R. 38 Bom. 120, dissented from. The plaintiff brought a suit against four sets of defendants for the recovery of certain documents of title and the goods covered thereby and in the alternative for damages. In his plaint he alleged that the goods in suit were his property, that the defendant No. 1 obtained from him the documents of title relating thereto by fraud and made them over to defendant No. 2; that defendant No. 2, knowing that defendant No. 1 had no title either to the documents or to the goods, wrongfully dealt with them and sold the goods to defendants Nos. 3 and 4: that defendants Nos. 3 and 4 wrongfully clamed to retain the goods and the documents of title; and, lastly, that one of the documents of title, viz., a railway receipt, was pledged by defendant No. 1 to defendant No. 5, though the goods covered by it were in the possession of defendant No. 3. *Held*, that the suit was not bad for misjoinder of parties and causes of action. RAMENDRA NATH ROY *v.* BRAJENDRA NATH DASS, (1917) I. L. R. 45 Calc. 111

Mitakshara: *See* HINDU LAW—JOINT FAMILY 666, 732

Mokarari Lease: *See* LEASE, CONSTRUCTION OF 87

Money-decree: *See* EXECUTION OF DECREE 530

——— **execution of**: *See* LIMITATION 630

Mortgage: *See* CONSIDERATION ... 773

———: *See* EVIDENCE, ADMISSIBILITY OF 320

Mortgage—*Second mortgage-debt secured by sureties—Assignment of equity of redemption to sureties—Sub-mortgage by sureties in favour of assignor—*

PAGE.

Mortgage—*contd.*

Sale of mortgaged property by prior mortgagee—Subsequent sale by sub-mortgagee—Remainder of mortgaged property in existence and available for sale insufficient to satisfy sub-mortgagee's debt—Application for personal decree against sub mortgagors—Civil Procedure Code (Act V of 1908) O. XXXIV, r. 6. The plaintiffs, who were the mortgagees of the equity of redemption in respect of certain properties, further secured their mortgage debt by a promissory note executed in their favour by two sureties on behalf of the mortgagor. They subsequently assigned their equity of redemption to the sureties, who executed a sub-mortgage thereof in favour of the plaintiffs. Sometime after, the plaintiffs obtained a preliminary mortgage decree, which was later followed by a final decree directing that the premises charged under the mortgage or a sufficient part thereof should be sold subject to the prior mortgage. In the meantime between the dates of the preliminary and final decrees, the mortgagor having been adjudicated an insolvent, the prior mortgagee obtained an order of the Court exercising insolvency jurisdiction, that the zemindari properties included in the prior mortgage should be sold free from all incumbrances, and that the balance of the sale-proceeds, after payment of the costs of the sale and the claim of the prior mortgagee, should be retained by the Official Assignee and be paid by him in discharge of other incumbrances in accordance with their respective priorities. The sale was duly carried out by the Official Assignee in pursuance of this order. The amount thus realised was not sufficient to meet the debt of the prior mortgagee. Subsequently, in pursuance of the mortgage decree, the Registrar put up for sale the equity of redemption in certain properties specified in the plaintiffs mortgage and remaining unsold at the sale by the Official Assignee, and as the amount realised at the Registrar's sale was not sufficient to meet the plaintiffs' debt, the plaintiffs applied for and obtained a personal decree against the sub-mortgagors for the amount of their claim :—*Held*, that the plaintiff's claim for a personal decree was not debarred. *Per* SANDERSON C. J. Having regard to the fact that all the properties covered by the mortgage, which were in existence and which were available for sale at the date of the sale, were sold (by the Registrar), and assuming that the plaintiffs were not responsible for the fact that some of the properties included in the mortgage were not in reality available for sale, though the sale purported to include them, I think it should be taken that the provisions contained in the rules and the directions contained in the mortgage decrees as to the sale have been complied with, and that the plaintiffs are entitled to the personal decree which the learned Judge has directed. *Ram Ranjan Chakavarti* v. *Indra Narain Dass*, I. L. R. 33 Calc. 890, and *Badri Das* v. *Inayat Khan*, I. L. R. 22 All. 404, distinguished. *Per* WOODROFFE J. We must look at this matter rationally and with reference to the reason of the rule, namely, that the personal liability will only be enforced where there is a deficiency after the sale of all the mortgaged property available for sale at the date of sale In other words, the personal liability must not be improperly increased. SATISH RANJAN DAS *v.* MERCANTILE BANK OF INDIA, LD. (1917), I. L. R. 45 Calc. 702

———*Transfer of Property Act (IV of 1882), s. 9—Execution of mortgage by pardanashin lady, attestation of—Requirements as to identity of executant and as to witnesses seeing actual execution of deed—Acknowledgment of her signature by executant.* On a question whether a mortgage sued upon had been properly attested under the provisions of section 59 of

PAGE.

Mortgage—*concld.*

the Transfer of Property Act (IV of 1882), the evidence showed that the attesting witnesses had not, though present, seen the executant (a *pardanashin* lady) sign the deed, but had subsequently to the execution received from her son, who had been with her on the other side of the *pardah*, an acknowledgment that the signature on the deed had been made by his mother :—*Held* (reversing the judgment of the High Court), that the requirements of section 59 had not been complied with, and the deed was therefore, invalid as a mortgage. *Shamu Pattar Abdul Kadir Ravuthan*, I. L. R. 35 Mad. 607 ; L. R. 39 I. A. 35, and *Padarath Halwai* v. *Ram Nain Upadhia*, I. L. R. 37 All 474 ; L. R. 42 I. A. 163, distinguished. GANGA PERSHAD SINGH *v.* ISHRI PERSHAD SINGH (1918), I. L. R. 45 Calc. 747

——— **Bond :** *See* EXECUTION OF DECREE 530

——— **Deed, attestation of :** *See* PARDANASHIN LADY 747

———, **suit on a :** *See* AMENDMENT OF PLAINT 305

Mother, power of, to alienate minor's property : *See* MAHOMEDAN LAW—MARRIAGE 878

Motor Car : *See* CONTRACT FOR SALE ... 481

——- **Vehicle**—*Motor Vehicles Act (VIII of 1914)—Rules framed thereunder by Governnor-in-Council—Rules 3 and 19—Liability of owner of taxi-cab for rash and negligent driving by his servant*—The owner of a motor vehicle is liable, under Part II, rule 3 of the rules framed by the Governor-in-Council under s. 11 of the Indian Motor Vehicles Act (VIII of 1914), for breach of rule 19 by his licensed driver. Where the driver of a taxi-cab negligently drove the same into a drain causing injury to the passengers in the car : *Held*, that the owner of the taxi-cab was liable to prosecution and punishment, under s. 16 of the Act read with the aforesaid rules 3 and 19, for the act of his driver. *Thornton* v. *Emperor*, I. L. R. 38 Calc. 415, followed. BAIDYA NATH BOSE *v.* EMPEROR (1917) I. L. R. 45 Calc. 430

Motor Vehicles Act (VIII of 1914), Rules 3, 19 : *See* MOTOR VEHICLES ... 430

Moveables, hypothecation of : *See* ADMINISTRATION 653

Municipal Election—*Election Roll—Qualifications of voters—Sitting Commissioner as candidate for election—Objections to voters' claims to be on Election Roll—Chairman's decision refusing to expunge names of voters from the Roll—Jurisdiction of the High Court to interfere—"Occupier"—Specific Relief Act (I of 1877), s. 45—Calcutta Municipal Act (Beng. III of 1899), ss. 3 (30), 37, 47, and Sch. IV, rules 3, 8 (1).* The sitting Commissioner for one of the wards in the Calcutta Municipality, who was one of the candidates for election as a Commissioner for that same ward at the forthcoming Municipal election, and who was also a voter on the list of voters in respect of another ward, objected that the names of various persons should not be entered and retained on the Municipal Election Roll for the ward for which he was a candidate. The Chairman of the Corporation having heard the objections, refused to expunge those names from the Election Roll. *Held*, that the High Court had jurisdiction under s. 45 of the Specific Relief Act to interfere in this matter. *In re Nisith C. Sen*, I. L. R. 39 Calc. 754, and *In re Romesh Chandra Sen*, 16 C. W. N. 472, followed. *Held*, also, that to make a person, who occupied certain premises, and who was entitled to the owner's vote in respect thereof, entitled to a vote as occupier in respect of the same premises, he must either pay rent to the owner or be liable to pay rent. *Held*, also, that voters must give written notice of their claims, whether they sign the

PAGE.

Municipal Election—*concld.*

notice or not, to the Chairman of the Corporation under the provisions of rule 8 (*i*) of Sch. IV of the Calcutta Municipal Act prior to 1st January immediately preceding each general election. It was upon the person objecting to the votes to prove that the voters had not complied with the provisions of the Act or the rules. *Held*, also, that the only persons to whom rule 3 of Sch. IV of the Calcutta Municipal Act applied, were persons who were actually liable for the rates in respect of the six months specified therein. *Held*, also, that persons occupying flats or portions of houses used as flats which were not separately assessed as such in the records of the Corporation, were not associations of individuals within the meaning of s. 37 of Calcutta Municipal Act. *Held*, also, that the word "occupier" in section 37 (*2*) (*i*) (*c*) and in section 37 (*2*) (*i*) (*a*) of the Calcutta Municipal Act meant an occupier in the ordinary sense and not as defined in s. 3 (*30*) of that Act, and the only person who fell within section 37 (*2*) (*i*) (*c*) was a person who occupied a building separately numbered and valued for assessment. *In re* SURENDRA CHANDRA GHOSE (1918) I. L. R. 45 Calc. 950

Non-confessional Statements: *See* MISDIRECTION 557

Notice: *See* PUBLIC DEMANDS ... 496

Novelty: *See* DESIGN 606

Oaths Act (X of 1873). s. 5: *See* WITNESS 720

Occupancy Holding—*Transferability—Gift, validity of—Revocation of gift—Transfer of Property Act (IV of 1882), ss. 122, 123, 126.* In cases of transfer by gift of occupancy holdings, the question of transferability cannot be raised by the heir of the donor to the prejudice of the donee or his representative in interest. *Rahim Jan Bibi* v. *Iman Jan*, 17 C. L. J. 173, referred to. Where a gift duly registered and executed is not suspended or made revocable on

PAGE.

Occupancy Holding—*concld.*

the happening of any specified event or in any of the cases (save want or failure of consideration) in which if it were a contract, it might be rescinded as provided for in s. 126 of the Transfer of Property Act; it cannot be maintained that the property comprised in such gift continued to form part of the estate of the donor. The property ceased to be part of the donor's estate and the heir did not succeed thereto by right of inheritance. In cases of transfers for value, the title passes from the transferor to the transferee, although the validity of the transfer is liable to be questioned by the landlord who is not a party to the transaction and may possibly refuse to recognise the transfer. *Dayamayi* v. *Ananda Mohan Roy Chowdhury*, I. L. R. 42 Calc. 172, followed. *Villers* v. *Beaumont*, 1 Vern. 101, referred to. *Milroy* v. *Lord*, 4 DeG. F. & J. 264, *Richards* v. *Delbridge*, L. R. 18 Eq. 11, *Amulya Ratan Sircar* v. *Tarini Nath Dey*, I. L. R. 42 Calc. 254, distinguished. BEHARI LAL GHOSE *v.* SINDHUBALA DASI (1917) I. L. R. 45 Calc. ... 434

Oral Evidence: CONTRACT FOR SALE ... 481

Origin: *See* CUSTOM 833

Owner, liability of: *See* MOTOR VEHICLES 430

Pardanashin Lady: *See* MORTGAGE ... 747

———*See* PURDANASHIN LADY.

Parties: *See* MISJOINDER 111

———*Admission of one of the parties to a suit—When such admission receivable against other defendants—Identity—A document per se not inadmssible—Objection to its admission in appeal for the first time.* When several persons are jointly interested in the subject-matter of a suit, an admission of any one of these persons is receivable not only against himself but also against the other defendants, whether they be all jointly suing or sued, provided that the admission relates to the subject-matter in dispute and be made by the declarant in his character

PAGE.

Parties—*contd.*

of a person jointly interested with the party against whom the evidence is tendered. The requirement of the identity in the legal interest between the joint owners is of fundamental importance. *Kowsulliah Sundari* v. *Mukta Sundari*, I. L. R. 11 Calc 588, *Chalho Singh* v. *Jharo Singh*, I. L. R., 39 Calc. 995, *Meajan Matbar* v. *Alimuddi*, I. L. R. 44 Calc. 130, *Blenkinsopp* v. *Blenkinsopp*, 11 Beav. 134 ; 2 Phillip 607, referred to. The admission of one co-plaintiff or co-defendant is not receivable against another merely by virtue of his position as a co-party in the litigation. If the rule were otherwise, it would in practice permit a litigant to discredit an opponent's claim merely, by joinning any person as the opponent's co-party and then employing that person's statements as admissions. Consequently, it is not by virtue of the person's relation to the litigation that the admission of one can be used against the other ; it must be, because of some priority of title or of obligation. *Morse* v. *Royal*, 12 Ves. 355, *King* v. *The inhabitants of Hardwick*, 11 East 578, referred to. The Court will not entertain, for the first time, in appeal an objection that a document which *per se* is not inadmissible in evidence, has been improperly admitted in evidence. *Girindra Chandra Ganguli* v. *Rajendra Nath Chatterjee*, 1 C. W. N. 530, *Preonath Mazumdar* v. *Durga Tarini Ghose*, 14 C. L. J. 578, referred to. AMBAR ALI *v.* LUTFE ALI (1917), I. L. R. 45 Calc. ... 159

———*Right to sue—Cause of action, survival of—Abatement of suit—Letters of Administration, application by residuary legatee for grant of—Death of residuary legatee—Substitution of heir of residuary legatee—Contentious matter—Civil Procedure Code (Act V of 1908), O XXII.* The right to a grant of administration is a personal right derived from the Court. If on the death of the testatrix, the residuary legatee under her will had obtained a grant of administration to her estate with a copy of the will annexed, his title would have been derived from the Court and would not devolve on his heir. The heir of the residuary legatee may be the proper person to obtain a grant of administration with a copy of the will annexed, but this is not by virtue of any right to administration which he inherited from the residuary legatee, but by virtue of the fact that as heir of the residuary legatee, he is the person most interested in the estate of the testatrix. *Sarat Chandra Banerjee* v. *Nani Mohon Banerjee*, I. L. R. 36 Calc. 799, referred to. HARIBHUSAN DATTA *v.* MANMATHA NATH DATTA 1918), I. L. R. 45 Calc. ... 860

Partition: *See* **Hindu Law**—JOINT FAMILY 732

———*Suit for partition—Jurisdiction—Partition Act (IV of 1893), s. 4—"Court"—"Dwelling-house"*—A, B and C were the joint owners of a property. A sold his share to Z. Z instituted a suit for partition. B and C claimed to purchase Z's share under s. 4 of the Partition Act. The Court of first instance made a preliminary decree and appointed a Commissioner and subsequently made a final decree. B and C appealed. The lower Appellate Court remanded the case for the determination of the suit under s. 4 of the said Act. *Held*, that the word "Court" in s. 4 of the Partition Act included the Appellate Court. The latter like the trial Court was bound, upon any member of the family who was a shareholder undertaking to buy the share of the transferee, to make an appropriate order in pursuance of which the steps necessary to carry out the provisions of the section would be taken either in the one Court or in the other. *Held*, also, that in connection with a conveyance or a partition of a "Dwelling-house," the word would generally mean not only the house

PAGE.

Partition—*concld.*

itself but also the land and appurtenances which were ordinarily and reasonably necessary for its enjoyment. *Kshirode Chunder Ghosal* v. *Saroda Prosad Mitra*, 12 C. L. J. 525, referred to. PRAN KRISHNA BHANDARI *v.* SURATH CHANDRA ROY (1918), I. L. R. 45 Calc. ... 873

Partition Act (IV of 1893), s. 4: *See* PARTITION... 873

Patents and Designs Act (II of 1911), ss. 62, 64, 67: *See* DESIGN ... 606

Patni, consideration for: *See* ILLEGAL CESS 259

Payment: *See* SALE OF GOODS ... 28

Penal Code (Act XLV of 1860), s. 366: *See* ABDUCTION 641

Pergana Register: *See* LAKHERAJ LANDS 574

Permanency of Rent, presumption of: *See* LANDLORD AND TENANT ... 930

Personal Decree, against sub-mortgagee: *See* MORTGAGE 702

Personal Liability: *See* EXECUTOR ... 538

Peshkosh—*Abwab—Antiquity and purpose of payment—Contractual foundation—Bengal Tenancy Act (VIII of 1885). ss. 74 ; 30 (c)—Public Demands Recovery Act (Beng. I of 1895).* Where the Collector in execution of a certificate issued under the Public Demands Recovery Act realised from the plaintiffs certain charges described as *peshkosh* levied on two estates from time immemorial, and the plaintiff sued for a declaration that it was illegal and prayed for the cancellation of the certificate for the refund of the amount thereunder, and for a perpetual injunction restraining the defendant from levying the *peshkosh* in future :—*Held*, that *peshkosh* could not be regarded as an imposition in the nature of an *abwab* within the meaning of the various provisions enacted on that subject. Such payment came out of the land and the right thereto was an interest in the land to which a title might be made by prescription. *Held*, also, that the peculiar situation and character of the land and antiquity and purpose of the payment all pointed

PAGE.

Peshkosh—*concld.*

to a legitimate contractual foundation. *Udoy Narain Jana* v. *The Secretary of State for India in Council*, (1915) S A No. 44 of 1912 (unreported), referred to. LAKSHMI NARAYAN ROY *v* SECRETARY OF STATE FOR INDIA (1918), I. L. R. 45 Calc. 866

Petition of Compromise: *See* COMPROMISE 814

Possession, presumption arising from: *See* LAKHERAJ LANDS 574

Possession, suit for: *See* CHAUKIDARI CHAKARAN LANDS 685

———————*See* EX PARTE DECREE 920

Possessory Suit—*Specific Relief Act (I of 1877), s. 9—Second appeal—Civil Procedure Code (Act V of 1908), s. 102—Review.* Where in a suit under s. 9 of the Specific Relief Act, judgment was purported to be passed against five defendants but the decree was drawn up against one defendant only who alone contested the suit, and the decree-holder applied for execution against all the defendants, the Court dismissed the application on the ground that the decree was against one defendant only ; on appeal the District Judge allowed execution to proceed against all the defendants, but on a subsequent application for review he discharged his original order on the ground of jurisdiction under s. 9 of the Specific Relief Act : *Held*, that an application in execution proceedings was included in the term "suit" in s. 9 of the Specific Relief Act, and an appeal to the District Judge from an order of the Court of first instance was incompetent and the application for review equally so. *Thomas Souza* v. *Gulam Moidin Beari*, I. L. R. 26 Mad. 438, *Moufuz Ali* v. *Birj Nand Kirat*, (1915) P. L. R. 45, *Anund Chunder Roy* v. *Sidhi Gopal Misser*, 8 W. R. 112 *Gora Chand Misser* v. *Baykanto Narayan Singh*, 12 B. L. R. 261, *Din Dayal* v. *Patrakhan*,

PAGE.

Possessory Suit—*contd.*

I. L. R. 18 All. 481, *Narayan Parmanand* v. *Nagin as Bhaidas*, I. L. R. 30 Bom. 113, *Mavula Ammal* v. *Mavula Maracoir*, I. L. R. 30 Mad. 212, *Shyama Charan Mitter* v. *Debendra Nath Mukerjee*, I. L. R. 27 Calc. 484, *Minakshi Naidu* v. *Subramaniya Sastri*, I. L. R. 11 Mad. 26; L. R. 14 I. A. 160, *Sasi Bhusan Mookerjee* v. *Radha Nath Bose*, 20 C. L. J. 433, and *Profulla Krishna Deb* v. *Nosibannesa Bibi*, 24 C. L. J. 331, referred to. KANAI LAL GHOSE *v.* JATINDRA NATH CHANDRA (1917), I. L. R. 45 Calc. 519

Practice : *See* AMENDMENT OF PLAINT ... 305

———*See* EXAMINATION ON COMMISSION 697

———*See* MISJOINDER 111

———*See* REVIEW 60

Practice and Procedure : *See* COMMISSION AGENCY 138

Presidency Magistrate, jurisdiction of : *See* COMPANY 490

Presumption : *See* DEPOSITION ... 823

Prevailing Rate : *See* LANDLORD AND TENANT 930

Printer, liability of : *See* CONTEMPT OF COURT 169

Private Sale : *See* ATTACHMENT BEFORE JUDGMENT 779

Prize Court, adjudication by : *See* SALE OF GOODS 28

Procedure : *See* REVIEW 60

Proof : *See* CUSTOM ... 450, 833

Proof : *See* CUSTOM OR USAGE ... 285

Prosecution by Judges : *See* CONTEMPT OF COURT 169

Public Demands—*What is a proper notice—Onus of proper service—Public Demands Recovery Act (Beng. I of 1895), ss. 10, 31.* Service of notice under s. 10 of the Public Demands Recovery Act, 1895, must be effected in strict conformity with that section. Where service of notice is effected by fixing it on the outer door of the judgment-debtor's house, the onus is clearly upon the

PAGE

Public demands—*concld.*

defendant relying on the notice to show that there was proper service as required by law. *Rakhal Chandra Rai Chowdhury* v. *The Secretary of State for India*, I. L. R. 12 Calc. 603, and *Jogeswar Sahu* v. *Debi Prasad*, 5 C. L. J. 555, followed. NEMAI CHARAN DE *v.* SECRETARY OF STATE FOR INDIA (1917), I. L. R. 45 CALC. 496

Public Demands Recovery Act (Beng. I of 1895) : *See* PESHKOSH 866

Public Demands Recovery Act (Beng. I of 1895, ss. 10, 31 : *See* PUBLIC DEMANDS 496

Publication : *See* CONTEMPT OF COURT ... 169

Publicity : *See* BURMESE BUDDHIST LAW —ADOPTION 1

Punjab Laws Act, 1872, s. 5 : *See* CUSTOM 450

Purchase : *See* TITLE, PROOF OF ... 999

Purchaser, title of : *See* CHAUKIDARI CHAKARAN LANDS 764

Purdanashin Lady : *See* EXAMINATION ON COMMISSION ... 492, 697

Putni Lease : *See* CHAUKIDAKI CHAKARAN LANDS 685

Question of Fact : *See* CUSTOM OR USAGE 285

Question of Law : *See* CUSTOM OR USAGE 285

Receiver : *See* LEASE 940

Receiving Stolen Property : *See* AUTREFOIS ACQUIT 727

Record of Rights, correctness of : *See* BENGAL TENANCY ACT, ss. 5, 103B 803

Recoupment—*Powers under Calcutta Improvement Act (Beng. V of 1911), ss. 2, 3, 36, 37, 39, 41, 42 (a), 49 (1), 69, 71 (b), 78, 81, 89, 123, Sch., cl. 13*—"*Betterment*"—"*Affected*"—*Lands Clauses Consolidation Act, (8 & 9 Vict. c. 18) ss. 63, 68,—Land Acquisition Act (I of 1894), ss. 6, 9, 23 (1) (4), 24 (6), 48.—House and Town Planning Act, 1909 (9 Edw. VII, c. 44), s. 58 (3).—Calcutta Municipal Act (Beng. III of 1899),*

PAGE.

Recoupment—*contd.*

s. 357 (2),—Bombay City Improvement Act (Bom. IV of 1898,) ss. 25, 29—Reference to Full Bench when incompetent. Per CURIAM (CHATTERJEA J, dissenting). The Calcutta Improvement Act does authorize the Board of Trustees to acquire land compulsorily for purposes of "recoupment," *i.e.*, by selling or otherwise dealing with the land under section 81 or by abandoning the land in consideration of the payment of a sum under section 78. *Trustees for the Improvement of Calcutta* v. *Chandra Kanta Ghosh*, I. L. R. 44 Calc. 219, overruled in so far as it decides to the contrary. *Per* CHATTERJEA J. The Act does not authorize compulsory acquisition of land for the purpose of recoupment. The lands are not to be included in the scheme originally for the purpose of thereafter making profits, but if they are properly included in the scheme and subsequently found not to be required, the Board have the power to dispose of such lands. The question referred to the Full Bench did arise (CHATTERJEA J. *contra*). *Prosonno Coomar Paul Chowdhry* v. *Koylash Chunder Paul Chowdhry*, B. L. R. (F. B.) 759, distinguished. The preamble does not control the enacting provisions of the Act In section 42 (*a*) of Beng. Act V of 1911 "affected" means affected in any way, and not merely "injuriously affected" *The Metropolitan Board of Works* v. *Owen McCarthy*, L. R. 7 H. L. 243, explained. The words "by the execution of the scheme" used in section 42 (*a*) simply mean through or owing to the execution of the scheme. *Hammersmith and City Railway Co.* v. *Brand*, L. R. 4 H. L. 171, distinguished. Section 78 does not apply only "to land which was originally required for the execution of the scheme but was subsequently found to be unnecessary." *Per* TEUNON J. The area fixed and sanctioned as "the area comprised in the scheme" corresponds with the "lands delineated on the plans" in England. MANI LALL SINGH v. TRUSTEES FOR THE IMPROVEMENT OF CALCUTTA (1917) I. L. R. 45 Calc. 343

Reocvery of Rents Act (Beng. X of 1859, s. 10 : *See* ILLEGAL CESS ... 259

Reference to Full Bench: *See* RECOUPMENT 343

Registration : *See* DESIGN 606

Regulation V of 1812, s. 3 : *See* ILLEGAL CESS 259

Regulation VIII of 1793, ss. 52, 54 : *See* ILLEGAL CESS 259

Regulation (XIX of 1793,) ss. 22 to 25 : *See* LAKHERAJ LANDS 574

Rent—*Commutation—Bengal Tenancy Act (VIII of 1885), s 40, sub-ss. (1), (2), (3), s. 109. Order for commutation of rent—Jurisdiction.* Where under s 40 of the Bengal Tenancy Act, an application by a tenant for commutation of rent was made to a Subdivisional Officer, who transferred the same to a Settlement Officer, who in his turn transferred it to an Assistant Settlement Officer who heard and decided the application on its merits: *Held*, that it was not competent for the Subdivisional Officer to transfer the application to the Settlement Officer. *Held*, further, that it was incumbent on the Court to satisfy itself that an order made on an application under s. 40 of the Bengal Tenancy Act was made with jurisdiction, though it was not competent to examine the propriety of an order so made. *Lalla Saligram Singh v. Mohunt Ramgir*, 3 C. W. N. 311, *Kali Krishna Biswas* v. *Ram Chandra Baidya*, 21 C. L. J. 487; 19 C. W. N. 823, followed. JADU NATH MANNA *v* PRANKRISHNA DAS (1917), I. L. R. 45 Calc. 768

Rent, remission of : *See* CUSTOM ... 475

Requirements : *See* MORTGAGE ... 747

PAGE.

Res judicata—*British Baluchistan Regulation (IX of 1896), s. 10—Issue not "finally decided" in former suit—Civil Procedure Code, 1882, s. 13—Defence of fraudulent representation in suit on a bond.* Section 10 of the British Baluchistan Regulation IX of 1896 creates an estoppel by judgment only when the "matter in issue" has been "finally decided." *Sheosagar Singh* v. *Sitaram Singh*, I. L. R. 24 Calc. 616; L. R. 24 I. A. 50, followed. That was a case under s. 13 of the Civil Procedure Code, 1882, which, so far as the question under discussion is concerned, is similar to section 10 of the Baluchistan Regulation. The appellant (defendant) had brought a suit for cancellation of a bond on the ground that he was induced to execute it by the fraudulent representations of the respondent (the present plaintiff). The first Court held that he had failed to establish the fraud, and that decision was affirmed on appeal by the District Judge. He then brought a second appeal to the Judicial Commissioner who declined to go into the merits of the case and, upholding an objection by the respondent to the frame of the suit, dismissed the appeal. In a suit brought by the respondent to enforce the bond, the appellant raised the same issue as before, and the two lower Courts held that the issue was *res judicata*, and the Judicial Commissioner dismissed an appeal to him from that decision. *Held* by the Judicial Committee, that the defence in the present suit was not *res judicata*, the allegation regarding the execution of the bond on the fraudulent representations of the respondent never having been "finally decided" in the Judicial Commissioner's Court. ABDULLA ASHGAR ALI KHAN *v.* GANESH DASS (1917), I. L. R. 45 Calc. ... 442

Residuary Legatee, death of: *See* PARTIES 860

Resumption: *See* CHAUKIDARI CHAKARAN LANDS 685

PAGE.

Resumption by Government: *See* CHAUKIDARI CHAKARAN LANDS... ... 764

Revenue-paying Estate: *See* CHAUKIDARI CHAKARAN LANDS 764

Revenue Sale Law (Act XI of 1859): *See* CHAUKIDARI CHAKARAN LANDS ... 764

Reversioner: *See* DECLARATORY DECREE 510

——— *See* HINDU LAW—REVERSIONER 590

Review: *See* POSSESSORY SUIT ... 519

———*Procedure and Practice—Discovery of new and important matter of evidence—Character of evidence—Trial of issue—Appeal against order granting review—Civil Procedure Code (Act V of 1908) O. XLIII, r. 1 (w); O. XLVII, rr. 1, 4, 7, 8.* The plaintiff obtained a decree in a suit instituted against the defendant. Subsequently, the defendant applied for a review of the decree on the ground of the discovery of new and important matter of evidence, which was not within his knowledge and could not be produced by him at the trial, and obtained a Rule calling upon the plaintiff to show cause why the said decree should not be reviewed and why this suit should not be set down on the peremptory list of suits for hearing. Upon the Rule coming on for hearing, the Court directed an issue to be tried as to the new and important matter discovered after the judgment in this case. This issue having come on for trial, the Court decided the issue in favour of the defendant and the Rule was made absolute. *Held*, that this application for review was not granted in contravention to rule 4 of O. XLVII of the Civil Procedure Code, and it was not possible for the Court on this appeal to say that the learned Judge ought not to have made an order for review. *Held*, also, that the additional evidence was of such an unsatisfactory nature and it came into existence in such an unsatisfactory way and the learned Judge was apparently in such doubt as to whether it should

PAGE.

Review—*concld.*

be accepted, that it ought not to be taken as sufficient to overrule the distinct and clear opinion which he had formed. *Per* SANDERSON C. J. It is most important that there should be some finality in the trial of cases, and the greatest care ought to be exercised in granting a review, when that review is asked for upon the allegation that fresh evidence has been discovered since the judgment was given. In an ordinary case where the appeal is on a question of fact, where the learned Judge of the Court of first instance has heard and seen the witnesses and has come to a conclusion upon the question of fact upon the evidence on the one side and on the other, there is a very great onus upon the shoulders of the appellant when he comes to this Court and asks it to overrule the decision of the learned Judge upon the question of fact. *Per* MOOKERJEE J. Under O. XLVII, r. 7, an order granting an application for review may be attacked by way of appeal on the ground that the application has been granted on the ground of discovery of new evidence without strict proof of the applicant that such new evidence was not within his knowledge or could not be adduced by him when the decree was passed. NANDALAL MULLICK *v.* PANCHANAN MUKERJEE (1917), I. L.R. 45 Calc. 60

Revision: *See* LIMITATION 94

Right of Suit: *See* PARTIES ... 860

Sale: *See* CHAUKIDARI CHAKARAN LANDS 764

——*Bengal Tenancy Act (VIII of 1885)—Sale of tenancy—Status of the decree-holder Effect of the cessation of interest (partial or entire) of the landlord.* Where the decree-holder continued to be the sole landlord at the date of the application for execution of the decree and in his character as landlord decree-holder took the necessary steps for the sale of the under-tenure in conformity

PAGE.

Sale—*concld.*

with the statutory provisions, the effect of the execution sale is to pass the under-tenure to the purchaser, even though the decree-holder has lost his interest as landlord before the actual sale. *Forbes* v. *Maharaj Bahadur Singh*, I. L. R. 41 Calc. 926, distinguished. *Hem Chunder Bhunjo* v. *Mon Mohini Dassi*, 3 C. W. N. 604, *Chhatrapat Singh* v. *Gopi Chand Bothra*, I. L. R. 26 Calc. 750, *Srimant Roy* v. *Mahadeo Mahata*, I. L. R. 31, Calc. 550, *Khetra Pal Singh* v. *Kritarthamoyi Dassi*, I. L. R. 33 Calc. 566, *Prafulla* v. *Nasibannessa*, 24 C. L. J. 331, referred to. SYEDUNNESSA KHATUN *v.* AMIRUDDI (1917) I. L. R. 45 Calc. 294

——*Date of sale whether date of confirmation—Bengal Tenancy Act (VIII of 1885), ss. 167, 169.* The words "date of sale" referred to in s. 157 of the Bengal Tenancy Act mean the date when the sale is confirmed and not the date when the property is actually sold to the purchaser. *Matangini Chaudhurani* v. *Sreenath Das*, 7 C. W. N. 552, referred to. *Banko Behary Das* v. *Krishna Chandra Bhowmick*, 18 C. W. N 349; 18 C. L. J. 170, approved. *Yusuf Gazi* v. *Asmat Mollah*, 17 C. W. N. 440, dissented from. NANDA LAL BANERJEE *v.* UMESH CHANDRA DAS (1917) I. L. R. 45 Calc. ... 151

Sale by prior Mortgagee: *See* MORTGAGE 702

Sale in Execution of decree: *See* ATTACHMENT BEFORE JUDGMENT ... 779

Sale of Goods—*Vendor and purchaser—C. I. F. Contract—Payment to be made after goods had been landed—Breach of Contract—Failure of vendors to deliver bill of lading or goods—Contract of affreightment—Property consigned on enemy vessel—War declared whilst cargo at sea—Capture of vessel and cargo—Adjudication by Prize Court—Condemnation of vessel—Release of cargo—Effect of war an executory contract—*

PAGE.

Sale of Goods—*contd.*

Impossibility of performance—Void contract—Contract Act (IX of 1872), s. 56. On the 2nd February, 1914, the defendant firm agreed to sell to the plaintiffs 150 tons of basic steel bars under a c. i. f. contract free Hooghly. The shipments were to be made in June, July and October and delivery to be completed within three days from the date of the landing of the goods. Furthermore, it was agreed between the parties that 45 days credit from the date of the delivery of the goods should be allowed to the plaintiffs. In respect of the July shipment, the goods which consisted of partly Belgian and partly German manufacture, were shipped on the 2nd July, 1914, from Antwerp per S.S. *Steinturm*, a German steamer. On the 4th August, 1914, when war was declared between England and Germany, the S.S. *Steinturm* was at sea. She was subsequently captured with her cargo by a British cruiser and taken to Colombo for adjudication. The Prize Court condemned the vessel but released the cargo, which was brought to Calcutta at the expense of Government. The Government, thereupon, notified the vendors that the goods had arrived and the latter immediately communicated with the purchasers asking them to take delivery of the goods on payment of certain extra charges to Government. The plaintiffs having refused to do so, the goods were sold by the defendants on purchasers' account and risk. In a suit for breach of contract and for damages :—*Held*, that the variation of the terms as to the time of payment did not alter the nature of the contract as a c. i. f. contract. *Held*, also, that it was an implied part of the contract of the 2nd February, 1914, that the defendants should procure a contract of affreightment under which the goods would be dilivered in the Hooghly. *Held*, also, that the contract between the plaintiffs and the defendants included the performance of an act (*viz.*, the procuring of the contract of affreightment under which the goods would be delivered in the Hooghly) which after the contract was made become impossible by reason of the outbreak of war, within the meaning of section 56 of the Indian Contract Act and consequently the contract of the 2nd February 1914, was void. MADHORAM HURDEO DAS *v.* G. C. SETT (1917), I. L. R. 45 Calc. 28

Sanction for Prosecution—"*Court*"—"*Court of Justice*"—*Calcutta Improvement Tribunal, whether a "Court"—Criminal Procedure Code (Act V of 1898) s. 195—Calcutta Improvement Act (Beng. V of 1911), ss. 70, 71 (a), (c) and 77, as amended by the Calcutta Improvement (Appeals) Act (XVIII of 1911)—Evidence Act (I of 1872), s. 3.* The word "Court" in s. 195 of the Criminal Procedure Code has a wider meaning than "Court of Justice" under s. 20 of the Penal Code, and includes a tribunal entitled to deal with a particular matter and authorized to receive evidence bearing thereon in order to enable it to arrive at a determination upon the question. *Raghoobans Sahoy* v. *Kokil Singh*, I. L. R. 17 Calc. 872, and *Chandi Charan Giri* v. *Godadhur Pradhan*, 22 C. W. N. 165, referred to. The Tribunal constituted by the Calcutta Improvement Act (Beng. V of 1911), as amended by the Calcutta Improvement (Appeals) Act (XVIII of 1 11), is a "Court," within the meaning of s. 195 of the Criminal Procedure Code. *Hari Pandurang v. Secretary of State for India*, I. L. R. 27 Bom. 424, distinguished. NANDA LAL GANGULI *v.* KHETRA MOHAN GHOSE (1918) I. L. R. 45 Calc. ... 585

———— *Sanction by Deputy Collector in appraisement proceedings—No appeal from orders in such proceedings—Jurisdiction—Subordination of such Deputy*

PAGE.

Sanction for Prosecution—*concld.*

Collector to the District Judge or Commissioner of the Division—Bengal Tenancy Act (VIII of 1885), ss. 69 and 70 Criminal Procedure Code (Act V of 1898), s. 195 (6), (7) (b) (c). A Collector, or Deputy Collector exercising the powers of a Collector, under ss. 69 and 70 of the Bengal Tenancy Act (VIII of 1885), is a "Court" within s. 195 of Criminal Procedure Code. *Raghoobuns Sahoy* v. *Kokil Singh*, I. L. R. 17 Calc. 872, followed. *Abdullah Khan* v. *Emperor*, I. L. R. 37 Calc. 52, referred to. Proceedings under s. 69 of the Bengal Tenancy Act are civil in nature, and the Court of the Deputy Collector acting thereunder is subordinate to that of the District Judge under s. 195 (7). *Per* CHITTY J. S. 195 (7) (c) is intended to apply only where no appeal lies from any decision of a particular Court, and not where a particular order is non-appealable. Appeals from the Collector under the Bengal Tenancy Act, do not *ordinarily* lie to the Commissioner of the Division. In some cases they lie to him, and in others to the Civil Court. The Collector, in proceedings under ss 69 and 70 of the Act by reason of s. 195 (7) (b) of the Criminal Procedure Code, is subordinate to the Court of the District Judge. *Per* RICHARDSON J. Clause (c) includes both a particular case or class of cases in which no appeal lies, and a Court from which no appeal lies in any case. *Nibaran Chandra Chakrabarty* v. *Akshoy Kumar Banerjee*, 21 C. W. N. 948, referred to. *Per* CHITTY J. The words "Principal Court of Original Jurisdiction" do not refer to a Court of any particular class, but to a Civil, Criminal or Revenue Court according to the nature of the case in which the question of sanction arises, *Ajudia Prasad* v. *Ram Lall*, I. L. R. 34 All. 197, referred to by RICHARDSON J. CHANDI CHARAN GIRI *v.* GADADHAR PRADHAN (1917) I. L. R. 45 Calc. ... 336

PAGE.

Search-warrant—*Search-warrant for production of a person confined—Form of warrant—Use of warrant prescribed in Form VIII, Sch. V—Legality of warrant—Criminal Procedure Code (Act V of 1898), s. 100.* It is immaterial what form is used for a search-warrant under s. 100 of the Criminal Procedure Code, provided that the substance of it complies with the requirements of the section. A search-warrant intended to be issued under s. 100 of the Criminal Procedure Code, and drawn up in accordance with Form VIII, Schedule V, relating to search-warrants under s. 96, but the alterations adapted to meet the requirements of the former section, is legal. *Gurameah* v. *King-Emperor*, 16 C. W. N. 336, approved. *Bisu Haldar* v. *Emperor*, 11 C. W. N. 836, distinguished. LEGAL REMEMBRANCER *v.* MOZAM MOLLA (1918) I. L. R. 45 Calc. 905

Second Appeal: *See* CUSTOM OR USAGE 285

———— *See* PROSSESSORY SUIT 519

Second Mortgage: *See* MORTGAGE ... 702

Self-acquired Property, blending of: *See* HINDU LAW—JOINT FAMILY ... 732

Service of Notice, onus of: *See* PUBLIC DEMANDS 496

Settlement Proceedings: *See* WAJIB-UL-ARZ 791

Shares, hypothecation of: *See* ADMINISTRATION 653

Slang Terms: *See* MISDIRECTION ... 557

Special Judge order of: *See* APPEAL ... 638

Specific Relief Act (I of 1877), s. 9: *See* POSSESSORY SUIT 519

Specific Relief Act (I of 1877), s. 42, III (e): *See* DECLARATORY DECREE ... 510

Specific Relief Act (I of 1877) s. 45: *See* DESIGN 606

———————————: *See* MUNICIPAL ELECTION 950

Standard of Proof: *See* CONTEMPT OF COURT 169

PAGE.

Status of Tenant: *See* BENGAL TENANCY ACT, SS. 5, 103B 803

Still-head Duty: *See* ADMINISTRATION ... 653

Stipulation, in Kabuliat: *See* ILLEGAL CESS 259

Sub-mortgage, by Sureties: *See* MORTGAGE 702

Sub-soil Rights: *See* LEASE, CONSTRUCTION OF 87

Substitution: *See* PARTIES 860

Suit: *See* PARTITION 873

——*Limitation—Bengal Tenancy Act (VIII of 1885), ss. 104H, sub-s (2), 184, 185—Limitation Act (IX of 1908), ss. 29, 15, sub-s. (2), applicability of—Civil Procedure Code (Act V of 1908), s. 80.* A instituted a suit under s. 104H of the Bengal Tenancy Act against the Secretary of State for India in Council on the 10th December 1910, in respect of a village, the Record of Rights of which was finally published on the 2nd June 1910. A took exception to the latter. Prior to the institution of the suit, A served a notice on the defendant as required by s. 80 of the Civil Procedure Code: *Held*, that the suit was barred by limitation. *Held*, also, that s. 15, sub-s. (2) of the Limitation Act which was made applicable to suits, appeals and applications mentioned in Schedule III annexed to the Bengal Tenancy Act by virtue of s. 185, sub-s. (2), could not possibly apply to suits instituted under s. 104H which were not mentioned in Schedule III. On a plain reading of the provisions of s. 185 of the Bengal Tenancy Act along with s. 15, sub-s. (2) of the Limitation Act, the latter could not be applied to extend the period of six months provided for the institution of suits under s. 104H of the Bengal Tenancy Act. *Radhashyam Kar* v. *Dinabandhu Biswas*, 18 C. W. N. 31; 18 C. L. J. 533, *Sharoop Dass Mondal* v. *Jogessur Roy Chowdhury*, I. L. R. 26 Calc. 564. *Dulhin*

PAGE.

Suit—*concld.*

Mathura Das Koer v. *Bansidhar Singh*, 16 C. W. N. 904, *Srinivasa Ayyangar* v. *The Secretary of State for India*, I. L. R. 38 Mad. 92, referred to. *Dropadi* v. *Hira Lal*, I. L. R. 34 All. 496, distinguished. SECRETARY OF STATE FOR INDIA *v.* GANGADHAR NANDA (1917) I. L. R. 45 Calc. 934

Suit, above Rs. 5,000: *See* JURISDICTION 926

Surety: *See* MORTGAGE 702

Tenancy: *See* SALE 294

Tenant, status of: *See* BENGAL TENANCY ACT, 1885, SS. 5, 103B ... 803

Thakbust Map, evidentiary Value of: *See* LAKHERAJ LANDS 574

Theft: *See* AUTREFOIS ACQUIT ... 727

Title: *See* LANDLORD AND TENANT ... 755

——, **proof of**—*Purchase giving right to get a title, but not giving actual title—Benami purchase—Transfer by true owner—Action of father making transfer creating estoppel binding son—Conduct causing change of position in transferee—Onus of proof on person asserting minority of transferor.* The plaintiff (respondent) purchased the village of Badam in the zamindari of the late Raja of Deo, from *R*, a dancing girl, the natural daughter of the Raja who was the father of the defend ant (appellant). In 1886 the Raja's estate being heavily involved in debt, the provision of the Chota Nagpur Encumbered Estates Act (VI of 1876 as amended by V of 1884) were extended to Deo by a special Act, and a manager was appointed who, acting under the powers given him by the Act, sold the village by public auction, and it was purchased by *K* who, it afterwards appeared, was a *benamidar* for the Raja who provided the purchase money. No conveyance of the village was ever made by the manager to *K*. When the management came to an end in 1896, and the estate was restored to the Raja, he caused

PAGE.

Title—*contd.*

L, the son of *K* (who had died), to execute a conveyance of Badam in favour of *R* in order to benefit her and *M* her mother, *L* merely acting on the command of the Raja. *R* being then a minor put in through *M* a petition for registration and mutation of names, and the Raja himself assisted her, asking that her petition might be granted, and her name be inserted on the register, and stating that he had no objection whatever to that being done, and *R's* name was accordingly entered on the register as proprietor of the village. In October 1898 the Raja died and, his son being a minor, the estate came under the Court of Wards whose manager in 1899 summarily ejected *R* who was in possession, and conveyed the village to the surviving widow of the deceased Raja as being *gur* property and descendible from Rani to Rani. An application by her for mutation of names was opposed by R and rejected. The Rani thereupon filed a suit against R and the appellant basing her case on the allegation that *K* was *benamidar* for her. But the Subordinate Judge held that he was a *benamidar* of the late Raja, and dismissed the suit, a decision which was affirmed by the District Judge. In 1908 *R* executed the conveyance in favour of the plaintiff who brought the present suit against *R* and the appellant for declaration of title and for possession. The defence was a denial of *R's* title to convey, and a denial of her power to do so as being a minor. The Subordinate Judge upheld both defences and dismissed the suit. The High Court reversed that decision and gave the plaintiff a decree. *Held* (affirming that decision), that the onus of proving *R's* minority was on the appellant and he had not established his assertion. *Held*, also, that the sale by auction, though it gave *K* a right to get a title, did not give him an actual title. Both

PAGE.

Title—*concld.*

Courts found that *K* had failed to prove he was a true purchaser for value. When, therefore, *L* executed the conveyance in favour of *R*. the late Raja was the true owner. *K* was a trustee for him, and the trusteeship was all that *L* succeeded to. The late Raja too was proprietor of the estate of which Badam was a part ; so that if by renunciation or limitation the right of *K* to get conveyance became extinct, the full right and title were in the late Raja ; and not only did he cause *L* to execute the conveyance, but he actually assisted *R* to get registration of her name as owner. By so doing he caused her to change her position. for by such registration she became bound to the Government for all the liabilities attaching to the registered holders of immovable property. If the late Raja had lived and attempted to regain the property, that conduct would have estopped him from doing so. The appellant was his son, and succeeded by gratuitious title, and he could not, therefore, do what his father would have been unable to do. RAJA OF DEO *v.* ABDULLA (1918) I. L. R. 45 Calc. 909

Transfer: *See* CHAUKIDARI CHAKARAN LANDS 764

——— **effect of:** *See* CHAUKIDARI CHAKARAN LANDS 515

——— **by Father, effect of:** *See* TITLE, PROOF OF 909

——— **of Property Act (IV of 1882), s. 9:** *See* MORTGAGE 747

s. 10: *See* LEASE 940

s. 111, cl (*g*): *See* EJECTMENT ... 469

ss. 122, 123, 126: *See* OCCUPANCY HOLDING 434

Transfer to Landlord: *See* CHAUKIDARI CHAKARAN LANDS 685

PAGE.

Transferability: *See* OCCUPANCY HOLDING 434

Trial: *See* CONTEMPT OF COURT ... 169

Uncertainty: *See* CUSTOM 475

Uncertified Payment: *See* LIMITATION ... 630

Under-Tenant: *See* LANDLORD AND TENANT 755

Unrecorded Confessions: *See* MISDIRECTION 557

Usage: *See* CUSTOM 833

——: *See* CUSTOM OR USAGE ... 285

Vendor and Purchaser: *See* SALE OF GOODS 28

Village Chaukidari Act (Beng. VI of 1870): *See* CHAUKIDARI CHAKARAN LANDS 764

——, s 51: *See* CHAUKIDARI CHAKARAN LANDS 515. 685

Voters, qualifications of: *See* MUNICIPAL ELECTION 950

Waiver: *See* EJECTMENT 469

Wajib-ul-arz—*Authority of, as evidence—Its importance in settlement proceedings—Presumption as to its correctness until successfully impugned though not a document creating a title—Dispute between proprietors of two adjacent villages as to the ownership of village-common lands—Limitation.* The authority of a wajib-ul-arz or record-of-rights which is described by Sir Henry Maine in his "Village Communities" page 72, as a detailed statement of all rights in land drawn up periodically by the functionaries employed in settling the claims of the Government to their shares of the rental, and as the most important object of the Settlement Operations, not second even to the adjustment of Government revenue, is universally recognised. *Lali* v. *Murlidhar*, I. L. R. 28 All. 488; L. R. 33 I. A. 97, referred to. Though a wajib-ul-arz does not create a title, it gives rise to a presumption in its support which prevails until its correctness is successfully impugned. In a dispute between the proprietors of two villages,

PAGE.

Wajib-ul-arz—*concld.*

Mouzah Darakki and Mouzah Sher Ali of which the former belonged to the plaintiffs, and the latter to the defendants, as to the ownership of village-common lands measuring upwards of 7,989 acres, the plaintiffs contended that these lands belonged to them jointly with the defendants in proprietary right by virtue of the ownership of the two villages, and the defendants maintained that they were the exclusive proprietors, their lordships *held* that the final determination of the case depended on the interpretation to be placed on the wajib-ul-arz in which the final result of the settlement proceedings was recorded; and on that document together with the facts of the case, the plaintiffs' claim to joint ownership failed. The statements in the other documentary evidence adduced were ambiguous and not immutable. The laches of the plaintiffs in failing to assert their claim after it had been repeatedly and consistently challenged as long ago as 1883 was a circumstance, among others, very unfavourable for its success apart from the bar of limitation. DAKAS KHAN *v.* GHULAM KASIM KHAN (1918), I. L. R. 45 Calc. ... 791

War, effect of: *See* SALE OF GOODS ... 28

Widow, execution of deed by: *See* DECLARATORY DECREE 510

Witness—*Competency of a person, accused of an offence, as witness against another implicated therein, but separately tried—Admissibility of the deposition of a witness against himself on his subsequent trial—Evidence Act (I of 1872), ss. 118, 132—Oaths Act (X of 1873), s. 5—Criminal Procedure Code (Act V of 1898), s. 342(4).* Section 5 of the Oaths Act (X of 1873) and section 342(4) of the Criminal Procedure Code apply only to the accused actually under trial at the time. Such person cannot, therefore, be sworn as a witness, and no accused jointly tried is a competent witness for or against, the co-accused.

PAGE.

Witness—*concld.*

But when accused persons are tried separately, each one, though implicated in the same offence, is a competent witness at the trial of the other. *Reg.* v. *Narayan Sundar*, 5 Bom. H C. R. 1, and *Empress* v. *Durant*, I. L. R 23 Bom. 213, followed *Banu Singh* v. *Emperor*, I. L. R. 33 Calc. 1353, and *Amrita Lal Hazara* v. *Emperor*, I. L. R. 42 Calc. 957, approved. *Queen Empress* v. *Mona Puna*, I. L. R. 16 Bom. 661, *Subrahmania Ayyar* v. *King Emperor* I. L. R. 25 Mad. 61, and *Queen Empress* v. *Hussein Haji*, I. L. R. 25 Bom. 422, referred to. A previous deposition is admissible against the witness on his subsequent trial, unless he has brought himself within the protection of the proviso to s. 132 of the Evidence Act *King Empeeor* v. *Nanda Gopal Roy*, 20 C. W. N. 1128, explained and distinguished. AKHOY KUMAR MOOKERJEE v. EMPEROR, (1917) I. L. R. 45 Calc. ... 720

Words and Phrases—

"Affected": *See* RECOUPMENT ... 343

PAGE.

Words and Phrases—*concld.*

"Betterment": *See* RECOUPMENT ... 343

"Court": *See* PARTITION ... 873

——— *See* SANCTION FOR PROSECUTION 585

"Court of Justice": *See* SANCTION FOR PROSECUTION 585

"Due diligence": *See* LIMITATION 94

"Dwelling-house": *See* PARTITION 873

"Finally decided": *See* RES JUDICATA 442

"Judgment": *See* APPEAL ... 816

"Mai hak hakuk": *See* LEASE, CONSTUCTION OF 87

"Marry": *See* ABDUCTION ... 641

"Occupier": *See* MUNICIPAL ELECTION 950

"Sufficient Cause": See LIMITATION 94

"Until": *See* CONTRACT FOR SALE 481

"Up to": *See* CONTRACT FOR SALE 481

Wrist-watch Band: *See* DESIGN ... 606

Written Statement, refusing application to file: *See* APPEAL 816